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ONTARIO LABOUR RELATIONS BOARD REPORTS



July 1989



Ontario

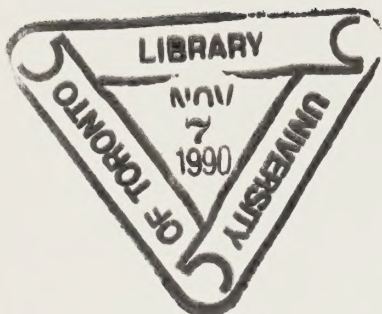
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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1989] OLRB REP. JULY

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario

NOTICE OF REVISED PRACTICE NOTES

PRACTICE NOTE #5

July 31, 1989
December 10, 1962, as amended October 18, 1971,
November 1, 1985, and July 31, 1989.

SERVICE OF DOCUMENTS AND NOTIFICATION OF PROCEEDINGS BY THE BOARD

1. One copy of all notices, documents and correspondence will be served by the Board on each of:
 - (a) the parties to the proceedings;
 - (b) the parties named in the proceedings as having an interest;
 2. In addition to the foregoing, each of the parties or persons so served will be allowed to inform the Board in writing of the name and address of one additional designated person and the Board will serve on such person a copy of all notices, documents and correspondence in the proceedings.
 3. If during the course of any proceedings, a party notifies the Board that it desires the additional copy of such notices, documents and correspondence to be served on a different designated person (whose name and address must be given) all subsequent notices, documents and correspondence will be served on the new person designated and no further service will be made on the former designated person.
 4. Where in any case, a counsel or advocate is named as representing a party, a copy of all subsequent notices, documents and correspondence in that case, will be served on such counsel or advocate in addition to the other services set out herein.
 5. Notwithstanding paragraphs 1 to 4, unless the Board otherwise specifically directs, after the first scheduled hearing date in the proceeding it is the responsibility of a party or participant who files any document or correspondence with the Board to serve a copy of the document or correspondence on all those entitled to notice. Any such document or correspondence so filed with the Board must be accompanied by a statement that the party filing it has effected the service required by this paragraph.
 6. The service requirements contained in paragraph 5 above shall not apply where the document or correspondence discloses whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.
 7. Should any dispute arise over service of documents or correspondence referred to in paragraph 5, the onus of proving service shall lie upon the party or participant seeking to rely on the said document or correspondence.
 8. If documents or correspondence are not served as required herein, the Board may refuse to consider such documents or correspondence, or may consider them on such terms or conditions as it deems appropriate.
- N.B. Service on persons other than the parties to the proceedings and their counsel or advocates is a matter of courtesy only.

PRACTICE NOTE #8

July 31, 1989

March 2, 1964, as amended October 20, 1966,
October 18, 1971, September 1975, and July 31, 1989

PRACTICE ON NOTICE OF APPLICATION FOR CERTIFICATION TO TRADE UNIONS CLAIMING AN INTEREST

1. In processing an application for certification, the Registrar is required under section 8 of the Board's Rules of Procedure to serve a copy of the application and a notice of application in Form 11 upon any trade union or council of trade unions named in the application or reply as claiming to be the bargaining agent of, or to represent, any employees who may be affected by the application. The Registrar is also required under the same rule to serve a copy of the application and a notice of application in Form 11 upon any trade union known to the Registrar as claiming to be the bargaining agent or to represent any employees who may be affected by the application.
 2. As required by the Rules, the Registrar will continue to serve notices on the employer and on any trade union whose interest is disclosed in the application or in the reply and the Registrar will also continue to forward to the employer notices addressed to the employees (Form 6 or Form 7) for posting on the premises of the employer in the places where the notices will come to the attention of all employees affected.
 3. An applicant or respondent should make certain that, in its application or reply, it has divulged whatever knowledge it may have that another trade union claims to be the bargaining agent for or to represent any of the employees affected by the application. It must be emphasized that, if such information is not divulged in the application or reply, the result may be delay in the decision of the Board.
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ZALEV BROTHERS LIMITED; RE ROBERT MCINTYRE; RE U.S.W.A., LOCAL 14045

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0111-89-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Beling Cement Construction Limited**, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Union making certification application under s.144 for the ICI sector and all other sectors in Board area 26 - Employer having employees in Board area 6 - Whether appropriate bargaining unit should be described in terms of both Board areas - Union not required to apply for more than one Board area

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members W. Gibson and J. Redshaw.

APPEARANCES: Jules Bloch, Keith Rimmington and Manny Andrade for the applicant; Brian D. Mulroney and Peter Ibs for the respondent; T. J. Billo, Roy Pyke, Bill Phillips and Terry Wilkinson for the objectors.

DECISION OF THE BOARD; July 25, 1989

1. The name of the respondent is amended to read: "Beling Cement Construction Limited".
2. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.
3. The Board finds that Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that they are constituent trade unions of the applicant.
4. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*.
5. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*.
6. The Board also finds that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 21, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.
7. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

8. A timely "statement of desire" or "petition" was filed with the Board by a group of employees indicating that they wish to oppose the union.
 9. The parties disagreed with respect to the appropriate bargaining unit and the list of employees filed by the respondent.
 10. The applicant seeks certification in respect of a bargaining unit that encompasses the Province of Ontario in the industrial, commercial and institutional (ICI) sector of the construction industry and Board Area #26 in all sectors of the construction industry, excluding the ICI sector.
 11. It is the position of the respondent that there were employees of the respondent at work in Board Area #6 on the application date and therefore the appropriate bargaining unit should be described in terms of ICI province-wide and Board Areas #6 and #26. Counsel for the respondent contended that there may be situations under section 144(1) of the Act where the Board is required to consider the *Usarco* type of community of interest criteria to determine whether one or more geographic area is appropriate (*Usarco Limited*, [1967] OLRB Rep. Sept. 526).
 12. Counsel for the respondent described his argument as "slightly different and novel" requesting that the Board hear evidence regarding the community of interest with respect to the employees in Board Areas #6 and #26. Since no such evidence was led before the Board in *Dagmar Construction Limited*, [1987] OLRB Rep. Apr. 480 and *Beaverbrook Estates Inc.*, [1989] OLRB Rep. Apr. 22, this panel of the Board should not follow the reasoning set out in these decisions. Counsel submitted that the Board must determine the appropriate bargaining unit by reading section 6(1) together with section 144(1) or 144(3). Counsel submitted that the identical word ("appropriate") is used in sections 6(1) and 144(1) and as a matter of statutory interpretation, the choice is not accidental. Counsel further submitted that if the union has the right to determine which Board area or areas it will apply for, then the Board is abdicating its statutory obligation to consider what is "appropriate".
 13. The applicant submitted that "appropriate" in section 144(1) deals with "geographic area" only and any linkage to section 6 would undermine the purpose of the construction sections of the Act. Paragraph 10 of *Dagmar, supra*, refers to *Watcon Inc.*, [1981] OLRB Rep. Nov. 1697 stating: "It does not suggest that there are circumstances under which such an application must pertain to more than one geographic area".
 14. The Board made a unanimous oral ruling on the day of hearing with respect to this issue as follows:

Having regard to the submissions of the parties and the cases cited, we find that in the circumstances the applicant is entitled to apply for Board Area #26 and ICI.
- The reasons are set out below.
15. Section 6(1) of the Act gives the Board discretion in determining "the unit of employees that is appropriate for collective bargaining". In applications for certification relating to the construction industry, that discretion is limited by sections 6(3), 119, 139 and 144 of the Act. The

Board in paragraph 12 of *Superior Plumbing & Heating Company Ltd.*, [1986] OLRB Rep. Nov. 1589, makes the following observation:

“The ICI province-wide scheme of collective bargaining is highly structured and stratified, and the usual factors relevant to a determination of the appropriate bargaining unit have only limited application in this statutory scheme. The concept of “community of interest” may well still apply, but if so, subject to the overriding principles and structure set up by section 144 and by the designation system, a system which designates the agents, and the trades they are entitled to represent, in the ICI province-wide component of the construction industry”.

At paragraph 42 of the decision in *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254, the Board commented that:

42. The Board’s general discretion, under section 6(1) of the Act, to determine what bargaining unit is appropriate in applications for certification in the construction industry, already somewhat limited by section 6(3) which deems craft units to be appropriate, was further limited by the enactment, in May 1980, of section 144.

In the construction industry, by definition, there is a community of interest as the designations cover specific trades or crafts and an employee bargaining agency (and their affiliated bargaining agents) can only apply for its trade or craft under section 144. In *Dagmar*, *supra* the Board found that a trade union under section 144(1) can apply for a bargaining unit ICI province-wide and one or more Board areas but is not required to apply for more than one Board (geographic) area.

16. Having regard to the above, the Board finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. At this point in the proceedings, the parties met with a Labour Relations Officer and agreed to the following summary of the challenges to the list of employees:

ONTARIO LABOUR RELATIONS BOARD

Board File: 0111-89-R

Between:

Labourers’ International Union of North America, Ontario Provincial District Council,

Applicant

and

Belting Cement Construction Limited,

Respondent

and

Group of Employees,

Objectors

1. It is understood by the parties that the following persons are challenged by the Applicant on the basis that on the date of application, each of them were (a) not working on the application date and/or (b) not working in Board Area 26 and/or (c) not working in the I.C.I. sector and/or (d) not doing bargaining unit work and/or (e) were performing managerial functions per section 1(3)(b):-

FRANK COLEMAN
WILLIAM PHILLIPS
RAY PYKE
HERB SCHMAKIES
RAYMOND GUTOSKIE.

2. It is the position of the Respondent and the Group of Employees that FRANK COLEMAN, WILLIAM PHILLIPS, RAY PYKE, HERB SCHMAKIES and RAYMOND GUTOSKIE were employees at work and performing tasks within the description of the bargaining unit on the date of application.
3. It is understood by the parties that JOHN STANLEY is challenged by the Applicant as doing bargaining unit work on the date of application.
4. The position of the Respondent and the Group of Employees is that JOHN STANLEY was not performing bargaining unit work on the date of application.
5. It is agreed by the parties that the following persons were employees at work and performing tasks within the description of the bargaining unit on the date of application:

DON BENDER
NORMAN DAVIS
TERRY DIETZ
STEVEN DAGENAIS
DAVE ELLIOTT
CHARLES GAULTON
BRAD GLOFCHESKIE
ROGER KETTLE
CECIL LOMOND
JOHN LOMOND
RONALD LOMOND
KEVIN REEBELING
JAMES ROSE
HELMUT RYBICKI
DOUGLAS TSCHIRHART
DARWIN VALLANCE
PAUL VINE

8. It is the position of the Respondent that the following persons were among those employees performing ICI work during all or part of the day on April 13, 1989, being the date of application:

FRANK COLEMAN
NORMAN DAVIS
DAVE ELLIOTT
BRAD GLOFCHESKIE
RAYMOND GUTOSKIE
RONALD LOMOND
WILLIAM PHILLIPS

ROY PYKE
JAMES ROSE
HERB SCHMAKIES
PAUL VINE

Dated at Toronto this 1st day of June, 1989

"Keith Rimmington" "Peter Ibs"
For the Applicant For the Respondent

per: "T. J. Billo"
For the Group of Employees

18. Having regard to the above, the Board authorizes a Labour Relations Officer to inquire into and report back to the Board on the list of employees in the bargaining unit with respect to:

- (1) conducting a check of the respondent's records for the purpose of enabling the Board to determine whether the challenged individuals in paragraph 17 above were at work on the application date, including the location of the job site;
- (ii) inquiring into the nature of the work performed by the challenged individuals in paragraph 17 above in order to enable the Board to determine whether they were performing bargaining unit work on the date of application, including the location of the job site;
- (iii) inquiring into the duties and responsibilities of the challenged individuals in paragraph 17 above, for the purposes of enabling the Board to determine whether they exercised managerial functions.

19. This matter is referred to the Registrar.

CONCURRING DECISION OF BOARD MEMBER W. GIBSON; July 25, 1989

1. I concur with the decision in this case, because I realize that, on the strict wording of section 144(1) of the *Labour Relations Act*, a union may apply to be certified for non-ICI work for just one geographic area, even though, on the date of application, the employer has employees working in more than one geographic area.

2. However, I wish to highlight once again (as I did in *Beaverbrook Estates*, File No. 2570-88-R) the severe fragmentation problems caused to an employer when the agreed bargaining unit covers his employees in only one geographic area, when he has employees working in more than one geographic area. This is of particular significance in this case where the non-ICI employees report to, and work out of the geographic area not covered by the bargaining unit.

0956-88-R; 1617-88-R; 1884-88-R; 1885-88-R; 2324-88-R; 2335-88-R Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and Barry Lightfoot, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and John McCormack, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and Elsie McCormack, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by The Ministry of Government Services, and Wayne Forbes c.o.b. as Forbes Janitorial Services, Respondents; Ontario Public Service Employees Union, Applicant v. The Crown in right of Ontario as represented by the Ministry of Transportation, and **Dunning Paving Limited**, Respondents

Abandonment - Bargaining Rights - Crown Transfer - Employer - Crown contracting out snow plowing, garbage pick-up, janitorial services, marking of trees and provincial park operations to individuals, partnerships and corporations - Whether contractors bound by collective agreement between union and Crown - Union knew of contracting out soon after it began in the early 1980's - Whether union abandoned bargaining rights - Whether contractors need to have employees to be "employers" within the meaning of the Act - Board declaring that all contractors bound by collective agreement

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *Alick Ryder* and *David Wright* for the applicant; *Roy C. Fillion*, *Karen E. Reynolds*, *Mary Beth Furanna*, and *Robert Armstrong* for the Ministry of Natural Resources; *Roy C. Fillion*, *Karen E. Reynolds*, and *Anne Dodds* for the Ministry of Government Services; *Roy C. Fillion*, *Karen E. Reynolds*, and *Malcolm Smeaton* for the Ministry of Transportation; *John Knight* and *Lorraine Norris* for John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services; *Andrew E. King* for John McCormack and Elsie McCormack; *Wayne Forbes* for Forbes Janitorial Services; *Ron Dunning* for Dunning Paving Limited; no one appeared for Barry Lightfoot.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; July 18, 1989.

1. The name of the Ministry representing the Crown in right of Ontario in File No. 2324-88-R is amended to read: "The Ministry of Government Services", the name of the other respondent to that application is amended to read: "Wayne Forbes c.o.b. as Forbes Janitorial Services", and the name of the second respondent in File No. 2335-88-R is amended to read: "Dunning Paving Limited".

2. These are six applications under the *Successor Rights (Crown Transfers) Act* (the "Act") in which the applicant (also referred to in this decision as "O.P.S.E.U." and the "Union") seeks declarations that, as a result of various alleged transfers of undertakings from the Crown in

right of Ontario (the “Crown”) to the other respondents, the latter are bound by the collective agreement entered into between the Union and the Crown (as represented by the Management Board of Cabinet).

3. It is the position of the Crown, and the other respondents who participated in these proceedings, that the applications should be dismissed because the Union has (allegedly) abandoned the bargaining rights to which these applications pertain. Dismissal is also sought in respect of some of the applications on the grounds that the alleged successor is not an “employer” within the meaning of the Act.

4. Counsel for the Union contended that the Crown did not have standing to raise the issue of abandonment. After hearing and recessing to consider submissions concerning that matter, the Board made the following unanimous oral ruling on April 4, 1989:

Having considered the submissions of counsel and reviewed the cited cases, we find no merit in the Union’s contention that the Crown does not have standing to raise the “abandonment” issue. Although we have not had detailed submissions concerning the scope of that issue, it appears to us to be arguable that the issue, as described by Mr. Filion, could have a bearing on whether the Board should declare that transfers of undertakings have occurred in the circumstances of these cases. The Board’s decision in *Ontario Hydro*, [1986] OLRB Rep. May 663, deals only with the question of what is required to give a person or other legal entity status as a party in proceedings. In the instant cases, the Crown is unquestionably a proper party. Indeed, section 11(3) of the *Successor Rights (Crown Transfers) Act* expressly recognizes that the Crown will be a party, and imposes an obligation on it to adduce at the hearing all facts within its knowledge that are material to the allegation. It appears to us that the “abandonment” facts are at least of arguable relevance to the allegations that undertakings have been transferred from the Crown to the other respondents in these cases. In any event, we are satisfied that the Crown is entitled, if not obligated, to place those facts before us through evidence, and having done so, to present argument as to whether or not the applications should be granted, including argument concerning the “abandonment” issue.

5. In the interests of avoiding unnecessary delay and maximizing the productive use of the hearing time which had been scheduled in respect of these matters, on April 4, 1989 the Board also directed the applicant and all of the respondents to forthwith produce to each of the other parties in their respective files all documents on which they intended to rely in these proceedings.

6. On the agreement of the parties, evidence was heard consecutively regarding File Nos. 2335-88-R, 0956-88-R, 2324-88-R, 1884-88-R and 1885-88-R, and 1617-88-R, on the understanding that the testimony of witnesses whose evidence was relevant to more than one file would be applied to the other pertinent files in order to avoid unnecessary duplication of evidence. During the six days of hearing which were devoted to the evidentiary stage of these proceedings, the Board heard testimony from twenty-two witnesses (including two who were called and then later recalled), and received thirty exhibits (including six exhibit books filed by the Crown, each of which contains numerous documents). On the agreement of the parties, the six applications were then argued together in view of the commonality of some of the issues. In preparing this decision, we have duly considered all of that oral and documentary evidence, as well as the inferences that may reasonably be drawn from it. We have also duly considered the able submissions that were

made on behalf of the parties. (Those submissions are summarized below, in paragraphs 37 to 47 of this decision.)

7. File No. 2335-88-R pertains to the contracting out of certain snow plowing in Patrol Number 16 of the Ministry of Transportation's London District to the respondent Dunning Paving Limited ("Dunning"). Ministry of Transportation ("M.O.T.") employees who perform road maintenance work on provincial highways during the summer (and other seasons when the weather permits such work to be done) use Ministry equipment to plow snow from those highways during the winter. However, since the M.O.T. does not have enough staff and equipment to handle all of the snow plowing for which it is responsible on provincial highways, and does not wish to purchase additional equipment that will only be used for a relatively short period of time each year, some of that work is contracted out to contractors such as Dunning, which provide their own equipment and employees. As suggested by its name, Dunning performs (asphalt) paving work during the summer. It has a garage in Woodstock where it keeps its trucks, loaders, rollers, and other equipment when they are not in use. It bids on M.O.T. contracts in order to utilize some of that equipment during the winter season.

8. M.O.T. contracts are let by a tendering process. Advertisements are placed in local newspapers by the Ministry to notify equipment owners of the type of equipment required, the location of the work, the term of the contract, and the standby rate (which is the amount paid for days on which the equipment is not needed). The advertisements also indicate where anyone who is interested can obtain specifications and tender documents, and the date and time by which sealed tenders must be submitted. The tenders are opened and read out at a public meeting. The contract is generally awarded to the contractor whose tender contains the lowest price per working hour (which price includes the rental of the truck and the provision of personnel to operate it).

9. Patrol Number 16 is a section of Highway 401 running from Woodstock west to the Highway 73 intersection near Putnam. It also includes a portion of Highway 59 from just north of Highway 401 to just south of Norwich. Part of the snow plowing in that patrol has been contracted out to contractors since the winter of 1981-82. The rest has always been performed by Ministry employees. Dunning has been one of the two successful bidders in respect of each snow plowing tender for Patrol Number 16 since 1981-82; its first contract was for the 1981-82 and 1982-83 winter seasons, and it has had a series of contracts with the M.O.T. covering each winter season since then. (Another contract has also been let in respect of snow plowing in Patrol Number 16 for each winter season since 1981-82, but the successful bidder on that contract has changed over the years; D. Ede had it for the 1981-82 and 1982-83 winter seasons, a contractor called "Jerrylou" had it for the next three winter seasons, and Lloyd Boyce Paving Inc. had it for the 1988-89 winter season under a contract which also covers the 1989-90 winter season.)

10. When employees first heard rumours in the summer of 1981 that snow plowing in Patrol Number 16 might be contracted out that year, they approached Tom Bertrand, who was the local union steward for the patrol at that time. (Mr. Bertrand, who was the second witness called by the Crown in these proceedings, is currently the patrol supervisor for Patrol Number 16.) It was Mr. Bertrand's evidence that at that time a lot of very unhappy employees came to him wanting to know if snow plowing was going to be contracted out and, if so, what could be done about it. After discussing the matter with the person who was then (but is no longer) the president of the local union, Mr. Bertrand, who was unaware of the Act, told the employees that nothing could be done about it.

11. Dunning's most recent snow plowing contract with the M.O.T. is for the 1988-89 and 1989-90 winter seasons. Under that contract, Dunning has agreed to rent a plow truck to the

M.O.T., and to provide personnel to operate that truck, for the sum of \$54.00 per working hour during the winter season, which generally runs from mid November to the end of March for snow plowing purposes. The contract contains detailed provisions concerning vehicle specifications, availability, conditions of employment, liability, and payment. Dunning is responsible for all maintenance work, washing, lubricants, and fuel, although the Ministry provides compressed air and water for use in cleaning and maintaining the vehicle, and also permits Dunning to use fuel from fuel tanks at the M.O.T. Patrol Yard provided that Dunning replaces the fuel from time to time. When not in use during the winter season, the plow truck which Dunning uses to fulfil the contract is parked in the Ministry's patrol yard for Patrol Number 16, where the Ministry stores supplies of salt and sand which are loaded onto Ministry and contractors' trucks by means of a loader which the Ministry rents from Dunning under a separate contract. Neither that contract nor the M.O.T. contract under which Dunning provides and operates a sanding truck are covered by the instant application, which pertains only to the aforementioned snow plowing contract. (With the exception of a one season break around 1986, Dunning has had a contract with the Ministry for the provision and operation of a sanding truck each winter since 1972, pursuant to a tendering process similar to that described above.)

12. Ron Dunning, the President and owner of Dunning Paving Limited, drives Dunning's plow truck himself to perform work covered by the snow plowing contract. Dunning also employs an individual named Barry Alexander on a part-time basis to operate that truck. (Two other persons, including Mr. Dunning's son Jeff, are employed by Dunning to operate the aforementioned sanding truck.) When the Ministry has snow plowing for Dunning to perform, Mr. Dunning or one of those other three persons is contacted by a M.O.T. shift supervisor.

13. The M.O.T. has six permanent patrol staff employed on Patrol Number 16 throughout the year. During the winter season, it also uses one employee from the Ministry's construction staff and three seasonal employees to assist in winter road maintenance operations. When they are not operating snow plows or graders to clear snow from the highways, those ten employees work on equipment maintenance and highway maintenance work such as cold mix patching, shoulder maintenance, sign repairs, and litter pick-up. A wintertime complement of about ten employees has been in place on Patrol Number 16 since 1981-82 when the contracting out of snow plowing on that patrol began. In the previous winter season (1980-81), there were nineteen employees assigned to Patrol Number 16. Thus, contracting out reduced by nine persons the winter season employee complement for that patrol. Snow plowing in respect of some other patrols in the London District had been contracted out since the 1979-80 winter season. By the 1981-82 winter season, snow plowing was being contracted out for six of the fourteen patrols in the London District. (Although patrols were originally numbered from 1 to 18, some of them have ceased to exist as a result of amalgamation with other patrols.)

14. During the course of cross-examining the Crown's first witness, Carl Hennum, who is the District Engineer for the M.O.T.'s London District, counsel for the Union sought to ask what M.O.T. personnel can do if employees of Dunning misconduct themselves. Counsel for the Crown objected to that question. After hearing and recessing to consider submissions concerning that objection, the Board made the following oral ruling:

Having duly considered the submissions of counsel, we are unanimously of the view that Mr. Filion's objection should be upheld. Mr. Ryder seeks to ask the witness the following question: "If Dunning people misconduct themselves what can the Ministry people do?" In responding to Mr. Filion's objection, Mr. Ryder asserted that the answer to this question could be relevant in determining whether the persons doing the snow plowing covered by

the contract between the respondents are employees of the contractor or of the Crown. He then indicated for the first time that an alternative position which his client now seeks to assert in these proceedings is that this application which his client has made should be dismissed because the people affected by it are Crown employees, and because there can be no abandonment of bargaining rights in respect of Crown employees in view of the provisions of the *Crown Employees Collective Bargaining Act*.

It is open to question whether this Board has jurisdiction to determine whether a person is or is not an employee of the Crown. Jurisdiction to decide that question is expressly conferred upon the Ontario Public Service Labour Relations Tribunal by section 40(1) of the *Crown Employees Collective Bargaining Act*. However, even if we do have concurrent jurisdiction, we are of the view that it is preferable to have the question decided by the Tribunal in view of the importance of the issue in the context of the collective bargaining relationship between the Crown and O.P.S.E.U., and in view of the experience and expertise of the Tribunal in dealing with issues of Crown employment. Moreover, we are of the view that it would be unfair and inappropriate to permit the applicant to raise this issue for the first time during the course of cross-examining the Crown's first witness. Neither the Crown nor the other respondent or any of the other individuals whose employment status O.P.S.E.U. now seeks to place in issue have had any notice that this issue would be raised in these proceedings.

Accordingly, the objection is upheld. If the applicant wishes to pursue the issue before the Tribunal under section 40(1), we will entertain a request that the hearing of this application be adjourned *sine die* pending the filing and adjudication of such application.

(Applicant's counsel then advised the Board that his client was not requesting an adjournment.)

15. Dunning received no notice or other indication that the Union was of the view that it was bound by the collective agreement until December of 1988 when it received a letter from the Union to that effect. The Crown also had no notice prior to the 1988-89 winter season that the Union intended to file any applications under the Act concerning the contracting out of snow plowing.

16. File No. 0956-88-R pertains to the contracting out, by the Ministry of Natural Resources (the "M.N.R.") to the respondent Barry Lightfoot, of the picking up and disposing of garbage from the Emily Provincial Park ("E.P.P."). That park has an area of approximately 69 hectares and is located about twenty kilometres north of Peterborough on the Pigeon River. It has about three hundred campsites and five hundred parking spaces for day use. Approximately twenty-four people are generally employed at E.P.P. during the summer, including a Park Superintendent, ten bargaining unit employees, and about thirteen students.

17. E.P.P.'s garbage pick-up and disposal was first contracted out in 1980. Prior to that it was done by M.N.R. employees. Contractors have been selected by means of a tendering process similar to that described above. Mr. Lightfoot was the successful bidder in 1980, and his contract was renewed in 1981 and 1982. In 1983 the contract was retendered and awarded to another contractor for the 1983, 1984, and 1985 seasons. However, in 1984 that other contractor failed to perform the work in a satisfactory manner. As a result, his contract was terminated. In the 1985 retendering, Mr. Lightfoot was once again the successful bidder and was awarded a contract for the

1985, 1986, and 1987 seasons. In 1988 Mr. Lightfoot, who was the only one who submitted a tender, was awarded a contract for the 1988, 1989, and 1990 seasons. That contract obligates Mr. Lightfoot to supply all equipment, vehicles, and labour required to pick up and dispose of garbage from twelve specified locations in the park on each of fifty collection days each year and from 116 other specified locations in the park on sixty collection days each year, as scheduled by Lyle Willard, the Park Superintendent. Under the terms of that contract, the M.N.R. agrees to provide at certain designated sites seven wooden garbage containers of a specified capacity, and to provide at various other specified locations a total of 120 metal garbage cans of certain dimensions. Mr. Willard told the Board that Mr. Lightfoot comes to the Park four times a week and spends between one hour and four hours performing his duties under the contract on each of those days. Early in the season, Mr. Lightfoot uses a quarter-ton or half-ton pick-up truck. Later in the season when there is more garbage, he uses a one ton stake truck with a high rack on it. Mr. Willard testified that he generally sees Mr. Lightfoot once or twice a week and has never seen anyone other than Mr. Lightfoot himself performing work covered by the contract. However, he acknowledged in cross-examination that he did not observe Mr. Lightfoot disposing of the garbage and that Mr. Lightfoot is entitled to use an employee to do that, or to perform any of the other work covered by the contract. As noted above, Mr. Lightfoot was not in attendance at the hearing. Thus, there is no evidence before the Board other than that of Mr. Willard concerning who performed the work covered by the contract.

18. The employees at E.P.P. are part of a unit serviced by Local 309 of O.P.S.E.U. John Broderick, who has been the President of that local since the mid 1970's, became aware of Mr. Lightfoot's contract within a short time after it was awarded. Some of the employees working at the park expressed concern to him that "people were being done out of their jobs by contracting out". Mr. Broderick shared their concern, but was unaware of the Act and did not think that anything could be done about the loss of jobs because at that time seasonal employees had no recall rights under the collective agreement. He did not consult with the local staff representative nor with anyone from the Union's head office concerning the matter.

19. File No. 2324-88-R pertains to the contracting out of certain janitorial services by the Ministry of Government Services ("M.G.S.") to Forbes Janitorial Services ("Forbes"), which is a sole proprietorship owned by Wayne Forbes. Those janitorial services are performed by Mr. Forbes at the Juvenile Observation and Detention Centre (the "Centre") at 1670 Oxford Street East in London. The Centre is an eighteen bed secure custody facility which provides residential services to persons aged twelve to sixteen who have been ordered into detention to await a court hearing or who have been ordered into secure custody under the *Young Offenders Act*. It is operated by the Ministry of Community and Social Services. Pursuant to an agreement with that Ministry, M.G.S. has undertaken to provide various property management and maintenance services, including janitorial cleaning services. M.G.S. has similar responsibilities for a number of other government buildings. In some cases it uses its own employees to perform those services. In other cases it uses a tendering process similar to those described above to arrange for a contractor to provide those services. Under that process, anyone can obtain tender documents from the M.G.S. except previous contractors who have been placed on a list of disqualified contractors because of poor performance.

20. The Centre opened in 1975. The evidence before us does not indicate whether janitorial services at the Centre were contracted out when the Centre first opened. Eric Morris, the Assistant District Manager for M.G.S. in London, told the Board that it is the Ministry's practice to retain contractual documents in the district for about three years, after which they are sent to Toronto for future disposal. He also testified that Ministry personnel in Toronto had been unable to produce any cleaning contracts for the Centre prior to 1986. However, an excerpt from the M.G.S. Annual

Report for the fiscal year ending March 31, 1977 which was entered as an exhibit in these proceedings indicates that a contract for janitorial services at the Centre was awarded to Industrial Building Maintenance (1971) Ltd. effective May 31, 1976. Subsequent M.G.S. Annual Reports indicate that a contract for janitorial services at the Centre was awarded to Portuguese Building Maintenance Company in 1978, Louis Janitorial Service Co. in 1979, and Continental Building Maintenance, division of 386044 Ontario Ltd. in 1981. There is no evidence before the Board concerning who provided janitorial services at the Centre from 1982 to 1985, but it is clear from the testimony of Owen McElhinney, who has been the Director of the Centre since 1978, that janitorial services were provided by contractors throughout that period. In 1985 a two-year contract was awarded to Oxford Building Maintenance ("Oxford") and in 1987 a two-year contract was awarded to P.D.Q. Building Services Management ("P.D.Q."). Wayne Forbes was employed as a cleaner at the Centre by Oxford in 1985 and 1986, and then by P.D.Q. in 1987 and 1988. During most of that four-year period, he was assisted by a part-time worker who performed light duty work four hours a day. However, when she quit in the Spring of 1988 no one was hired to replace her and Mr. Forbes carried on by himself, receiving payment for both jobs. When the contract was tendered in 1988, Mr. Forbes saw it advertised in a local newspaper and decided to submit a bid under the name Forbes Janitorial Services. (He had also bid on the previous contract but was not awarded it as his bid was slightly higher than P.D.Q.'s bid.) Since Forbes' bid for the two-year period of the current contract was the lowest one received, Forbes was awarded it. That contract details the type and frequency of cleaning services required to be performed. Under that contract, the building owner is required to provide a cleaner's closet for Forbes with a slop sink and storage space for supplies and equipment. The contract requires Forbes to provide all cleaning supplies and equipment, light bulbs and fluorescent tubes, and washroom supplies. It also obliges Forbes to maintain one cleaner on full day duty from 7:00 a.m. to 4:00 p.m. daily and one cleaner on half day duty from 8:00 a.m. to 12:00 p.m. daily, and specifies that a minimum hourly wage of \$6.63 must be paid to them. However, Mr. Forbes has continued to do all the work himself and has not employed any part-time or other help. Mr. Forbes has made an arrangement with P.D.Q. under which he will pay P.D.Q. to provide a replacement for him when he is away on vacation or absent due to illness. However, he had not yet had occasion to utilize that arrangement as of April 13, 1989 when he testified before the Board.

21. File No. 1884-88-R pertains to the M.N.R.'s contracting out to John McCormack of the operation and maintenance of the Magnetawan Lake Access Point ("M.L.A.P.") in Algonquin Provincial Park (the "Park"). File No. 1885-88-R pertains to the M.N.R.'s contracting out to Elsie McCormack of the operation and maintenance of the Park's Rain Lake Access Point ("R.L.A.P."). Access points are locations at which members of the public can park their vehicles, obtain information, purchase Park permits, and gain access to the interior of the Park. Some access points, such as R.L.A.P., also have a campground. There are a total of 29 access points in the Park. Prior to 1983, all of those access points were operated and maintained by employees of the M.N.R. Currently 23 of them are operated and maintained by contractors. The remaining six continue to be operated and maintained by M.N.R. staff. During the five to six month operating period, persons operating access points use facilities provided by the M.N.R. to sell Park permits and provide information to Park users concerning such matters as water levels, fishing prospects, and the number and difficulty of portages. They also maintain the access points by cutting grass, cleaning washrooms, cleaning up litter, collecting garbage, and maintaining parking lots and docks. The M.L.A.P. actually includes two access points, one providing access to Butt Lake and the other (about six kilometres to the north) providing access to Tim Lake. However, both of them are covered by a single contract which refers to them jointly under the name Magnetawan Lake Access Point (as does this decision).

22. A number of access points in the Park, including those covered by these two files, were

first contracted out in 1983. There were no tenders at that time as they were contracted out through a waiver of tender. In 1983, the operation and maintenance of M.L.A.P. was contracted out to Garnet Fraser, who had previously operated and maintained that access point as an employee of the M.N.R. In the following year, advertisements were placed in local newspapers seeking tenders in respect of the operation and maintenance of seven access points, including those covered by these two files. Tenderers were required to submit operating plans and financial bids expressed in terms of the percentage of total revenues from the sale of Park permits which they were prepared to remit to the Treasurer of Ontario. (In some instances, the operator is permitted to retain all of the Park permit revenue and is also paid a subsidy, in recognition of the relatively small amount of revenue generated by permit sales in some areas.) Successful bidders are selected on the basis of their financial bids and the score assigned to their operating plans by the M.N.R. Based on the tenders which he submitted, Mr. Fraser was awarded contracts in respect of the M.L.A.P. in 1984, 1985, and 1986-87. Although the evidence is somewhat meagre on the point, it appears that he carried out his duties and responsibilities under those contracts personally, without the assistance of any employees.

23. In 1988 the successful bidder for the M.L.A.P. operation and maintenance contract was John McCormack (who is Elsie McCormack's son). Under the contract which he signed with the M.N.R. in the Spring of 1988, Mr. McCormack was given permission to occupy and operate the "concession facility" described in Schedule "A" to that contract as a main building consisting of a one bedroom trailer residence with a small office structure attached to it, a small storage building, two parking lots, two vault toilets, dock facilities, and certain litter collection facilities. The contract also provides that if Mr. McCormack satisfactorily observes and performs all of its conditions and covenants, it may be renewed for up to four years (i.e., 1989, 1990, 1991, and 1992). It requires Mr. McCormack to pay rent to the Treasurer of Ontario in the sum of a specified percentage of all revenue collected from the sale of Park camping and day use permits during the Park's twenty-three week operating season (less the cost of any capital cost replacement projects approved by the Minister for performance during the off season). Other schedules to the contract detail such matters as operating conditions, insurance requirements, occupational hazards, and equipment provided by the Crown (including furniture, appliances, and radio communication equipment).

24. Mr. McCormack's fiancée Laurie assists him in operating M.L.A.P. Mr. McCormack has a full-time job in Huntsville and is only at the access point on weekends and a few times during the week. In his absence, his fiancée sells Park permits and performs the other duties imposed by the contract. When he was asked by Crown counsel whether his fiancée was his employee, he replied somewhat light-heartedly, "Yes and no.... When I worked with [a particular firm] I was a foreman and employees listened. Laurie doesn't." Although he does not actually pay her a salary but rather merely deposits the proceeds of the contract into their bank account, Mr. McCormack makes unemployment insurance and income tax remittances in respect of his fiancée and shows a salary to her as an expense for income tax purposes. He described the operation as being more in the nature of a joint venture between them rather than one involving an employment relationship.

25. As an employee of the M.N.R., Elsie McCormack's husband became the first access point attendant at the R.L.A.P. in 1970. After informally assisting her husband in operating and maintaining that access point for several years, she became a part-time employee of the M.N.R. in 1978. Unfortunately, her husband suffered a stroke later that year. In the following year, she applied for and obtained the position which he had formally held as the operator of R.L.A.P. When the M.N.R. decided to contract out the operation and maintenance of that access point in 1983, Ms. McCormack became the contractor. Based on the tenders which she submitted, she was also awarded contracts for the operation and maintenance of that access point in 1984, 1985, 1986-

87, and 1988. The latter contract is similar to the one described above in respect of M.L.A.P., although some of the details differ, such as the specified percentage of Park permit revenue to be paid to the Treasurer of Ontario, the description of the "concession facility" (which includes a log cabin that is a combination office and residence, a small storage building, a garbage storage building, and a canoe dock and boat launch), and the items of equipment provided by the Crown. It also provides for renewal for up to four years. As a contractor, Ms. McCormack performs essentially the same duties that she performed as an employee of the M.N.R., although as a contractor she has been required to assume some additional responsibilities, such as those reflected in the contractual provisions which require her to obtain, at her own expense, minimum public liability and property damage insurance of two million dollars. Ms. McCormack has never had any employees at any time during the six years that she has been the contractor at R.L.A.P., although she has received some gratuitous assistance from members of her family.

26. Ethel LaValley has been employed by the M.N.R. as an information counsellor in its Parks Department since 1974. Since 1980 she has been the President of O.P.S.E.U. Local 306, which has jurisdiction in the Algonquin District. She has also served as an elected Director on O.P.S.E.U.'s Executive Board for the past five years. When the M.N.R. transferred some employees in the Algonquin District to the Algonquin Forestry Authority in the early 1980's, Ms. LaValley spoke with Dalton Chapman, an O.P.S.E.U. staff representative, to find out if anything could be done for them. Mr. Chapman subsequently advised her that he had checked with the Union's head office and had been told that the Act did not apply. In 1983 and 1984 Ms. LaValley became aware through her position in the Parks Department that the operation and maintenance of a number of access points in the Park were going to be contracted out. This was a cause of concern for her as President of Local 306. When she expressed her concern to Mr. Chapman or another O.P.S.E.U. staff representative, she was told that nothing could be done. Nevertheless, she maintained a personal interest in the matter and discussed the situation with James Clancy after he was elected President of O.P.S.E.U. She advised him that contracting out was taking place in the Park and that although she did not think that it was a good way for the M.N.R. to treat past members, she was not sure how to fight it. In the summer of 1985 while Mr. Clancy was touring the Algonquin area in his capacity as the new President of the Union, Ms. LaValley brought him to R.L.A.P. to speak with Ms. McCormack. Ms. LaValley selected that access point as the one for Mr. Clancy to visit because it was close to Huntsville (where Mr. Clancy had been meeting with members of an O.P.S.E.U. local), and because she felt that Ms. McCormack would give them an honest opinion about how she felt about becoming a contractor and ceasing to be a Ministry employee. When they asked her about her situation, Ms. McCormack told them that while it would have been nice to remain an M.N.R. employee, "half a loaf" was better than nothing, given the cutbacks which were taking place. Thus, she left them with the impression that she felt fortunate to have the work, and did not want them to file a grievance or take any other action in respect of her contract. Ms. LaValley did not take Mr. Clancy to any other access points because of time limitations and because she felt that since many of the contractors had dedicated most of their lives to running those access points, they would not want to "ruffle any feathers" and thereby risk losing the work.

27. File No. 1617-88-R pertains to the M.N.R.'s contracting out of the marking and tallying of trees in part of its Lindsay District to John Knight and Lorraine Norris, who are partners carrying on business as Agassiz Forestry/Environmental Services. (For ease of reference, that partnership will be referred to in this decision as "Agassiz".) The tender for the contract in question was not advertised by the Ministry. An Official of the Ministry's Lindsay District wrote the following letter in July of 1988 to various firms which were felt to be capable of performing that work:

Lindsay District is currently requesting bids for a tree marking contract for 93 hectares.

Attached is a sample contract and a request for tender. Tenders will be opened at 2:00 p.m. on August 19th, and the final date for completion of marking is October 28th, 1988.

It is a condition of the tender that the tree marking crew be supervised at all times by a graduate of a two or four year forest management programme. You must have attached to your bid a covering letter which provides a brief description of your timetable, organization of marking crew and how the education/experience of staff provided by you would qualify your company to successfully complete this project.

It is not a condition of tender that sites need to be inspected prior to bidding. Prior to commencement of marking, however, the project supervisor of the successful tenderer must preview, with the management forester, the areas to be marked.

Please note the Summary and Calculation for Payment on page 3 of Schedule C, Section 5. For payment, tree marking quality must be 90% or greater; repair marking will be necessary if marking quality is less than 90%.

Also please note that the Successor Rights (Crown Transfers) Act may apply to this agreement.

If you have any questions, please contact Bruce Parks at this office.

28. Agassiz and four other firms submitted tenders in response to that request. After Mr. Knight was advised that Agassiz's bid had been accepted, he sent a performance deposit to the Ministry and confirmed, in the covering letter, that he and his partner were familiar with the Act and realized "the possible situation it may have towards this contract". Under the terms of the written contract which was subsequently signed, Agassiz agreed to mark and tally trees on a total of 93 hectares of public land owned by the Ganaraska River Conservation Authority and managed by the M.N.R. The purpose of that work was to select individual trees which would later be cut down (by someone else) as part of a thinning process. Mr. Knight and Ms. Norris performed that work by using yellow paint to place three dots on forty to forty-five percent of the conifer plantation, and by using an instrument called a diameter curve to measure the diameter of the marked trees (from which the volume of wood marked for removal could be estimated).

29. Mr. Knight, who has an Honours Bachelor of Science degree in biology from Lakehead University and a Forest Technician Diploma from Algonquin College, was employed by the M.N.R. in various locations as a seasonal employee in the spring and summer months of each year from 1976 to 1980, then under a series of nine-month contracts in the period from 1981 to 1985, and finally as a crew foremen during the summer and fall of 1986 (after which he worked for the M.O.T.). During his employment with the M.N.R., Mr. Knight spent some of his time performing work similar to that covered by the Agassiz contract. Ms. Norris, who has a Forest Technician Diploma from Sir Sandford Fleming College, was employed by the M.N.R. as a seasonal employee for five summers (in the period from 1983 to 1987). During that time she performed a variety of tasks including tree planting and forest fire detection work. At the time they applied for the aforementioned tree marking and tallying contract, the Agassiz partners were already under contract with the M.N.R. to perform a creel census in the Lindsay District. They proposed to perform the tree work on days the creel census did not run, and to later devote all of their working efforts to it after the creel census had been completed.

30. Mr. Knight and Ms. Norris used their own equipment and supplies to perform the work covered by the tree marking and tallying contract. They did not hire any employees to perform any of the work. The proceeds of the contract were shared equally by the two partners. Geoffrey Hingham, the M.N.R.'s District Forest Supervisor for the Lindsay District, told the Board that there is a possibility that trees in the area covered by that contract may have been marked ten or fifteen years ago by M.N.R. employees as part of a process which provides access to the area by removing

every fourth row of trees. However, it appears that the work performed under the Agassiz contract was the first marking that was performed there for thinning purposes. Both of those types of marking form part of the M.N.R.'s forest management program.

31. The M.N.R. has done tree marking and tallying in the Lindsay District every year for at least the past six years, but the locations in which it has been done have changed each year in accordance with the nature of the Ministry's forest management program, which requires different areas to be planted and tended at different times. Marking and tallying of trees was first contracted out by the M.N.R. in 1987 in the Lindsay District. That earlier contract was awarded to Maple Leaf Forestry & Ecological Service Ltd., which was selected as the successful bidder following a request by the Ministry for tenders. That contract was similar to the one awarded to Agassiz, but called for tree marking and tallying to be performed in different portions of the District.

32. As indicated above, some of the evidence adduced pertains to more than one file. It is unnecessary to set forth that evidence in detail. However, certain facts which emerge from it may appropriately be noted at this point. The evidence indicates that local union officers and stewards became aware of the contracting out of services such as snow plowing and operating of access points soon after they were first contracted out. At least some of that information was passed on to Union staff representatives (who are employees of the Union stationed in the field to service local unions). Some consideration was given at the local level to filing grievances, but it was concluded that grievances would not succeed because the Crown had the right to contract out work, and because seasonal employees, who were the persons most greatly affected by contracting out, had no recall rights under the collective agreement at that time. (A provision which required the Crown to offer non-probationary seasonal employees employment in their former positions in the following season on the basis of seniority was included in the January 1, 1984 to December 31, 1985 collective agreement, which was signed on October 30, 1986.)

33. The Union's head office in Toronto is divided into a number of departments. Applications under the Act are the responsibility of its Organizing Department. Persons in that department were aware in the early 1980's that contracting out of various services in various Ministries was occurring, but they had no knowledge of specific instances at that time. When a Union staff representative contacted the Organizing Department in the summer of 1983 to find out if anything could be done about the job loss which had resulted from the contracting out of cafeteria services at Alfred Agricultural College, Barbara Linds (who was a Union staff officer in the Organizing Department at that time) obtained a legal opinion concerning the applicability of the Act. After noting that typically the type of transaction covered by the Act was the acquisition by a private organization of an entire section or part of a section of a government service such as sewage and water works or a psychiatric facility, that opinion concluded (by analogy to the Board's jurisprudence under section 63 of the *Labour Relations Act*) that since nothing tangible or intangible had moved from the College to the contractor except the work of running the cafeteria, it was unlikely that it would be characterized as a transfer of an undertaking under the Act. The opinion also noted that an unsuccessful application under the Act in that case might have unfortunate ramifications in the future. That opinion guided the Organizing Department's view of the scope of the Act until April of 1987, when the Crown's application for judicial review of the Board's decision in *KBM Forestry Consultants Inc.*, [1987] OLRB Rep. March 399 ("*KBM*"), was dismissed by the Divisional Court. Prior to that, the Union had attempted to use political action and collective bargaining to curb privatization.

34. Thus, prior to the *KBM* decision, contracting out had generally been viewed by the Union as a legally unchallengeable exercise of Crown rights. As the danger posed to members' job security by privatization became increasingly apparent over the years with the Crown's expanding

use of contractors, the Union devoted greater resources to its opposition and ultimately embarked upon a widespread campaign against it. Early in 1988 a committee of head office department heads was formed, as was a Union task force concerning privatization. Through questionnaires and other forms of communication with local union officials, O.P.S.E.U. attempted to obtain as much detailed information as possible about contracting out, in order to be in a position to file applications under the Act. Documentation concerning contracting out was also obtained by the Union by means of an application under the *Freedom of Information and Protection of Privacy Act, 1987*. The first applications which the Union filed under the *Successor Rights (Crown Transfers) Act* pertained to “fresh” contracting out situations where immediate loss of jobs had occurred or appeared likely. Later applications, such as those presently before us, pertained to more “mature” situations in which the work in question had been contracted out for a number of years.

35. In May of 1988, a Union staff representative wrote the following letter to persons who had submitted tenders in respect of certain contracts in the M.N.R.’s North Bay district:

I am a representative of O.P.S.E.U. which is party to the Collective Agreement covering employees of the Government of Ontario.

I am writing to advise that by virtue of the *Crown Transfer Act*, the OPSEU Collective Agreement is binding on all private contractors respecting work contracted from the Government of Ontario.

In particular, you should know that as a contractor, you are obliged to:

- (a) offer employment to former Government employees who have completed their probationary period, on the basis of their seniority;
- (b) honour the wage, benefits and other obligations under the Collective Agreement.

The law in this respect was confirmed by a decision of the Ontario Relations Board [sic] in *Re KBM Consultants Inc.* dated March 25, 1987 (Board file number 2721-86-R) and further confirmed by the Supreme Court of Ontario (Divisional Court) by decision dated April 25, 1988.

We will be glad to discuss this matter with you and assist you in the performance of your obligations should you accept a Government contract. We should advise, however, that if you fail to comply with the Collective Agreement we will be obliged to commence the appropriate proceedings against you to enforce it.

36. R.A. Riley, who was then the M.N.R.’s Acting Assistant Deputy Minister (Administration), took strong exception to that letter and, in a letter dated June 17, 1988 to Fred Upshaw, who was the Acting President of O.P.S.E.U. at that time, asserted that it blatantly misrepresented the Crown’s contractual obligations and interfered with the M.N.R.’s ability to undertake contractual relations with the private sector. In his response dated July 12, 1988, Mr. Upshaw disputed Mr. Riley’s assertions and expressed the view that the M.N.R.’s practice of entering into contracts without advising the contractors of their obligations regarding the collective agreement was causing confusion and hardship for contractors and employees. After Michael Garrett became the M.N.R.’s Assistant Deputy Minister (Administration), he sent a memo in December of 1988 to the Ministry’s Regional Directors (and to the Director of its Aviation and Fire Management Centre) instructing them to insert certain specified clauses into all tenders and proposals to advise tenderers of the potential applicability of the Act and the collective agreement.

37. With respect to File No. 2324-88-R (Forbes), counsel for the Crown contended that in the absence of any evidence that janitorial services at the Centre had ever been performed by Crown employees, the application cannot succeed, as the Union has not established that it ever had a collective agreement with the Crown “in respect of employees employed in the undertak-

ing”. Thus, it was his contention that the Union was never in a position to seek relief under the Act concerning any transfer of undertaking by M.G.S. to a contractor in respect of janitorial services at the Centre. Crown counsel made a similar argument concerning File No. 1617-88-R (Agassiz), in respect of which he noted that there is no evidence that selection marking and tallying of trees had ever been done before in the area covered by Agassiz’s contract.

38. As indicated above, it is the position of the Crown, and the other respondents who participated in these proceedings, that all six applications should be dismissed on the basis of abandonment of bargaining rights by the Union. It is their position that by not bringing an application under the Act, serving notice to bargain, or taking any other action to assert any bargaining rights which it may have had as a result of what may have been a transfer of an undertaking at the time when the contracting out first occurred, the Union abandoned those bargaining rights and thereby disentitled itself to any relief under the Act.

39. As an alternative argument in respect of File Nos. 0956-88-R (Lightfoot) and 1884-88-R (John McCormack), Crown counsel submitted that where, as in each of those cases, the subject matter of the contract was contracted out to another contractor in the period preceding the contract to which the application pertains, the application cannot succeed because bargaining rights do not flow from one contractor to another. He referred the Board to *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, in support of that proposition. Counsel further submitted that those two applications cannot succeed because the continuity which would have been present if the work had been performed by Crown employees immediately prior to the contract was lacking. Thus, it was his contention that an application under the Act can only succeed in the context of the first instance of contracting out of work previously performed by Crown employees, and not in respect of any subsequent contracting out of that same work to another contractor, unless there has been an interval between contracts during which the Crown has resumed performance of the work by assigning it to Crown employees. (Crown counsel referred to this submission as the “lack of continuity” argument, and we have adopted that terminology herein for ease of exposition.) Thus, it was Crown counsel’s position that an undertaking only reverts to the Crown if, following the expiry or termination of a contract, Crown employees are used to perform the services previously performed by the contractor.

40. As a further alternative, counsel for the Crown submitted that if the undertaking does revert to the Crown upon expiry or termination of a contract, an application under section 2(1) cannot succeed in respect of the next contract because, at the time of the transfer effected by the next contract, the Union does not have “a collective agreement with the Crown in respect of employees employed in the undertaking”, as is required to make that provision applicable.

41. Crown counsel further submitted that the applications in File Nos. 0956-88-R (Lightfoot), 1617-88-R (Agassiz), 1884-88-R (John McCormack), 1885-88-R (Elsie McCormack), and 2324-88-R (Forbes) cannot succeed because section 2(1) applies only where an undertaking is “transferred from the Crown to an employer”, and none of the contractors in these files is an “employer” as each of them has no employees. In support of that contention, he referred the Board to Sack and Poskanzer, *Labour Law Terms*, which defines “employer” as a “person who engages others to work under his or her direction and control”; *CCH Canadian Labour Terms* (8th Ed., 1984), which defines “employer” as a “person or firm having control over the employment of workers and the payment of their wages”; and the following dictionary definitions of the term: *The Shorter Oxford English Dictionary* (3rd Ed.): “One who employs; *spec.* one who employs servants, workmen, etc. for wages”; *The Canadian Living Webster Encyclopedic Dictionary of the English Language*: “One that employs”; *Funk & Wagnall’s Comprehensive Standard International Dictionary* (1973): “One who employs a person or business firm that employs workmen, servants,

etc. for wages”; and *A New English Dictionary On Historical Principles* (1897): “One who employs.... One who employs servants, workmen, etc. for wages.” In this regard, it was the contention of counsel for the Crown that it is significant that the Legislature used the word “employer” in section 2(1) rather than broader terminology such as “person”, “individual”, or “firm”. With respect to File No. 1884-88-R, counsel for the Crown submitted that even though Mr. McCormack may have technically had his fiancée on his payroll for income tax purposes, in substance their relationship was more a partnership than an employment relationship. Counsel for the McCormacks adopted and supported Crown counsel’s submissions and suggested that the Board should not find either of his clients to be an employer as neither of them falls within the ambit of the mischief which the Act was designed to correct. He also suggested that the working relationship between Mr. McCormack and his fiancée was best described as a joint venture. In making submissions to the Board on behalf of Agassiz, Mr. Knight also contended that the Union’s application in File No. 1617-88-R could not succeed as Agassiz was a partnership which had no employees and, therefore, was not an “employer” within the meaning of the Act.

42. In responding to those submissions, counsel for the Union submitted that in order to enable the purposes of the Act to be achieved, “employer” should be interpreted to mean “the person to whom the undertaking has been transferred”. It was his position that the interpretation advocated by the respondents would permit the Crown to subvert the Union’s bargaining rights by replacing employees with individual contractors. He further contended that it would be impractical to find that the Act applies only to a contractor such as Mr. Forbes if he hires an employee to replace him while he is sick or on vacation. It was also submitted on behalf of the Union that the collective agreement obliges contractors to become employers by requiring them to offer seasonal work to seasonal employees who have seniority.

43. In responding to Crown counsel’s submissions concerning abandonment, counsel for O.P.S.E.U. contended that abandonment cannot be found in the absence of a voluntary and conscious action or statement on the part of the Union. He submitted that the Union’s unawareness (until the Spring of 1987) that the Act covers contracts such as those described in *KBM* provides a defence to any suggestion of abandonment. He further contended that even if the *KBM* decision had existed in the early 1980’s, the collective agreement’s lack of recall rights for seasonal employees would have rendered it impractical for the Union to perform the “academic exercise” of filing applications under the Act to obtain “theoretical rights”. It was also his contention that even before *KBM*, the Union had not shown the kind of disinterest generally associated with abandonment in that it had persistently objected on a political level to contracting out. Union counsel argued that in view of the serious detriment which the Union would suffer if found to be precluded from asserting its rights under the Act by reason of abandonment, no such finding should be made in the absence of very strong evidence. He also submitted that the letter quoted in paragraph 27 of this decision indicates that as of July of 1988, the Crown did not view the Union as having abandoned its bargaining rights. He further submitted that the correspondence referred to in paragraph 35 of this decision is also inconsistent with abandonment.

44. As an alternative argument, Union counsel submitted that even if the Board were to find that the Union had abandoned bargaining rights in respect of earlier contracts, such abandonment would be of no relevance in determining the Union’s rights in respect of the contracts which are before the Board in the instant applications. In this regard it was his contention that an undertaking is transferred to a contractor each time the Crown enters into such a contract, and that the undertaking reverts to the Crown on the termination of the contract. If the Crown subsequently enters into a new contract (with that or another contractor) the undertaking is again transferred by the Crown, thereby creating a fresh opportunity for the Union to make an application under the Act. Union counsel agreed with Crown counsel that there is no succession of bargaining rights

from contractor to contractor, but submitted that each transfer of an undertaking by the Crown to a contractor gives rise to a fresh opportunity for the Union to assert its bargaining rights by filing an application under the Act.

45. It was also Union counsel's position that the word "employees" in the section 2(1) phrase "collective agreement with the Crown in respect of employees employed in the undertaking" should be interpreted to mean "those who would do the work if done by the Crown". Thus, he contended that the inclusion of that phrase in section 2(1) does not mean that Crown employees must have been doing the work immediately before the undertaking was transferred. In support of that position, he noted the seasonal nature of much of the work, as well as the changeable nature of the services provided by the Crown. It was also submitted on behalf of the Union that the construction urged by the Crown is contrary to the Act's purpose of protecting bargaining rights, as it would enable the Crown to effectively eliminate the Union's bargaining rights by laying off the Crown employees who had been performing certain work, and then contracting out that work to a contractor shortly after the layoff at a time when no Crown employees were employed in the undertaking, or by contracting out seasonal work during the off season when no Crown employees were employed in the undertaking.

46. In his reply argument, Crown counsel submitted that abandonment of bargaining rights can occur through inadvertence. He further submitted that the lack of recall rights for seasonal employees prior to 1986 did not excuse the Union's failure to protect its bargaining rights by making applications under the Act and enforcing the wage, benefit, dues deduction, and other applicable provisions of the collective agreement. He refined his earlier submissions concerning the interpretation of section 2(1) by indicating that he was not suggesting that for that provision to be applicable there must have been Crown employees performing the work immediately prior to the contracting out. He submitted in his reply argument that the use of the present tense in that provision indicates that the section only applies where Crown employees have performed the work in question at some point during the term of the collective agreement in force at the time of the contracting out.

47. In replying to Union counsel's arguments concerning the meaning of "employer", Crown counsel contended that the Act was not designed to apply to contractors who performed all the work under their contracts themselves without the assistance of any employees. He disputed Union counsel's contention that the collective agreement requires a contractor to become an employer; it was his contention that nothing in the collective agreement precludes members of management from performing bargaining unit work. He further submitted that no meaningful bargaining or collective agreement enforcement could take place in the context of a contractor who has no employees and is under no obligation to hire any. Crown counsel did not dispute the assertion made by Union counsel during the course of these proceedings that, as a matter of law, there can be no abandonment of the bargaining rights which the *Crown Employees Collective Bargaining Act* has conferred upon the Union vis-a-vis the Crown in respect of Crown employees. However, he vigorously disputed the Union's contention that an undertaking reverts to the Crown each time a contract expires, and that there is a fresh transfer of the undertaking when the next contract is entered into by the Crown and that (or another) contractor.

48. The Act provides, in part, as follows:

1.-(1) In this Act,

- (a) "bargaining agent" means an employee organization that has representation rights under the *Crown Employees Collective Bargaining Act* or a trade union or council of trade unions that is certified as a bargaining agent under the *Labour Relations Act*;

- (b) "Board" means the Ontario Labour Relations Board;
- (c) "collective agreement" means an agreement in writing between the Crown or an employer and an employee organization, trade union or council of trade unions covering terms and conditions of employment;
- (d) "Crown" means Her Majesty in right of Ontario;
- (e) "employer" means an employer other than the Crown;
- (f) "transfer" means a conveyance, disposition or sale;
- (g) "Tribunal" means the Ontario Public Service Labour Relations Tribunal;
- (h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.

• • • •

2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

• • • •

4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause (a);
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
 - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

49. In the *KBM* decision, the majority of another panel of the Board wrote, in part, as follows in describing the purpose and scope of some of the provisions of the Act:

10. The relevant portions of the *Successor Rights (Crown Transfers) Act* are as follows:

1.-(1) In this Act,

• • •

(f) “transfer” means a conveyance, disposition or sale;

• • •

(h) “undertaking” means a business, enterprise, institution, program, project, work or a part of any of them.

(2)-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

Comparable provisions under section 63 of the *Labour Relations Act* (also referred to as “section 63”) are as follows:

63.-(1) In this section,

(a) “business” includes a part or parts thereof;

(b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto

• • •

In both statutes, there is provision for the Board to determine the composition of the bargaining unit where it is necessary to do so.

11. The *Successor Rights (Crown Transfers) Act* was enacted to fill the gap left by the fact that section 63 of the *Labour Relations Act* does not apply to the Crown: *Municipality of Metropolitan Toronto*, [1975] OLRB Rep. Oct. 777. In enacting the new statute, however, the Legislature employed wording different from that found under the parallel section 63 of the *Labour Relations Act*. That wording reflects the nature of certain of the wide range of activities engaged in by government. Thus even though jurisprudence under section 63 of the *Labour Relations Act* is applicable to applications under the *Successor Rights (Crown Transfers) Act* (see, for example, *The Ministry of Natural Resources*, [1986] OLRB Rep. March 331), cases under the latter statute must be considered in the context of the wording of that Act. As the Board said in *The Ministry of Natural Resources*, *supra*, at paragraph 4, “the *Successor Rights (Crown Transfers) Act* was intended to apply *at least* to circumstances analogous to those in which the Board has found a ‘sale of a business’ under section 63 of the *Labour Relations Act*” (emphasis added). The Board’s interpretation of section 2 of the *Successor Rights (Crown Transfers) Act* is not limited by its interpretation of section 63 of the *Labour Relations Act*, but must be given a broad interpretation (a general principle also applied to section 63) which takes into account the extensive definition of “undertaking”. For example, in our view, it does not require the transfer of physical assets, as suggested by counsel for KBM, nor does the length of the contract affect whether it is a “transfer”, as suggested by counsel for the Crown. Underlying the legislation is the recognition (a recognition also underlying section 63 of the *Labour Relations Act*) that “the continuity

of the work performed before and after the transfer [is of “particular significance”], since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section [63] is to preserve both the bargaining relationship and the collective agreement”: *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, paragraph 32, cited in *The Ministry of Natural Resources*, *supra*. More specifically in the context of the *Successor Rights (Crown Transfers) Act*, the gains achieved by the union with respect to the jobs which are integral to a particular government program are not to be lost through the government’s transferring that program (and those jobs) to a private entity (and *vice versa*). From another perspective, it may be said that whatever protections or conditions accrue to those jobs through representation by the union are not to be threatened through the government’s transferring the program or portion of a program, of which they are a part, to a private entity.

12. It has been held that under section 63, the transfer of work alone does not meet the requirements of the section: see, for example, *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 and *Corporation of the City of Stratford*, [1985] OLRB Rep. June 923. Under section 63, that which may be sold is the predecessor employer’s business or portion of a business which has been defined in relation to economic organization, including physical assets, operating personnel and goodwill: *Metropolitan Parking Inc.*, *supra*, and cases cited therein. Under section 2, on the other hand, that which may be transferred or conveyed includes “projects” or “programs” or “work”. We do not necessarily conclude that “work” within the meaning of section 2 means the same type of work as that the transfer of which does not alone satisfy the requirements of section 63, i.e., the performance of labour; more appropriately, work must be read within the context of the word “undertaking”. However, it is not necessary for us to decide that issue in this case. We are satisfied that in this case a “program” or “project” is the most relevant form of undertaking listed in section 2. A program or project may be defined as the inter-related steps or functions (or “the work”) established for the purpose of achieving a particular objective. The concept of “title” cannot attach to a project or program (although title to equipment or land might pass; however, we have already said that the transfer of either equipment or land is not necessary to a transfer within the meaning of section 2). Here, the Crown is involved in a reforestation project or program, operating out of its Thunder Bay Forest Nursery, and as part of that project or program, it is necessary to harvest seedlings which will later be replanted. A portion of this harvesting, following upon the loosening of the soil and prior to the actual replanting, was, but is no longer, done by the Ministry; it is now done by KBM. The Ministry has transferred (or “disposed” of) that part of the project to KBM, although it retains an interest in ensuring that the work performed by KBM is performed in a manner consistent with the standards established by the Ministry for the reforestation program. That brings it squarely within section 2 of the *Successor Rights (Crown Transfers) Act*. We are satisfied that there has been a continuation of the work and jobs, that OPSEU is the bargaining agent for employees performing that work and that the Crown and OPSEU are parties to a collective agreement applying to that work.

50. In considering the purpose and scope of section 2(1) of the Act, reference may also usefully be made to the following passages from the Board’s decision in *Charmaine’s Janitorial Services*, [1988] OLRB Rep. Sept 871 (“*Charmaine*”):

20. The jurisprudence makes it clear that the transfer of work alone does not constitute a sale of a business or part of a business under section 63: *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72, at para. 11 (“section [63] cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members”); *Metropolitan Parking Inc.*, *supra*, at paras. 36 (“The focus of section [63] is the business entity -- the employer’s total economic organization -- not simply the work which the employees perform.”), 38 (“A transfer of work, by itself, is simply not enough to ground a section 55 finding.”) and 44 (“The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so.”); *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536, at para. 33; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923.

21. We are of the view that the definition of “undertaking” in clause 1(1)(h) of the Act does not include the mere performance of labour in itself. Clause 1(1)(h) does not state that “undertak-

ing" includes the enumerated words, but rather that it *means* those words and therefore is limited to them. Where the context does not suggest a contrary intention, given a list of terms in a definitional phrase, the terms should be interpreted with reference to each other (that is, as "of the same kind or nature" or *ejusdem generis*), as counsel for the Crown argues, rather than interpreting one of the terms, here the term "work", as if it were the only term of its own class in a list of terms of another class or classes (that is, "of its own particular kind" or *sui generis*). Furthermore, "work" is part of a list which is preceded by the indefinite article "a" and the most common sense reading of the clause is that "undertaking" means a ... work or a part of [it]. We conclude that the term "work" does not refer in itself to the exertion of labour and that *in and by itself* the performance of labour does not constitute an undertaking.

22. As the Divisional Court indicated in *KBM, supra*, however, the *provision of services* may constitute an undertaking within the meaning of clause 1(1)(h) of the *Crown Transfers Act*. The provision of services is, of course, a function integral to modern governments and while it may be difficult to distinguish the provision of services from the performance of labour, in the government context, many programs are comprised in their physical manifestation of little more than the provision of services to the public. The *purpose* of such provision is nevertheless to carry out a government undertaking or part of an undertaking.

23. Thus under section 63, which is concerned with the private sector, the Board has been insistent on ensuring that more than the expenditure of energy or physical exertion be transferred from one entity to another in order for there to be a transfer of a business. It has held that if all that is transferred is the opportunity to do work, there is no transfer; there is no transfer, for example, if business A has contracted to business B the right to provide labour to carry out some purpose (such as providing personnel to help the predecessor employer run its hospitality portion of its business better: *The Charming Hostess Inc., supra*, paras. 37 - 39). For that reason, the Board has spoken of the transfer of assets, goodwill, inventory, customer lists and other indicia of a thriving or once thriving business and has required that some of such indicia be present to find that a business has been transferred. In referring to a "part" of a business, the Board has not been willing to consider the exertion of labour as constituting a "part", but rather has interpreted "part" as a coherent and severable portion of a business, such as one of a chain of stores or a clearly identifiable department in a factory: *Metropolitan Parking Inc., supra*, para. 33.

24. The distinction between "work" and a total business is less easy to make in the government context because of the nature of the undertakings carried on by government. While the purpose of section 63 and that of the *Crown Transfers Act* are analogous, it is not insignificant that the wording of the two provisions are not the same. The legislature has explicitly recognized that the functions of government place it in the role of employer, but that as an employer it may be engaged in quite different sorts of interests than the private sector, even as it also may be engaged in quite similar interests in form if not in substance; thus the provision of social assistance or of housing and the functions performed by employees in connection with such programs are fundamentally different than the usual private business and the functions carried out by its employees, but the running of a railway or of a bookshop will not outwardly be different whether carried on by a private employer or by government and can be characterised much more easily as a "business" than the provision of social assistance. Yet the provision of social assistance or of housing or the running of a railway or bookstore are all "undertakings" within the meaning of clause 1(1)(h) of the *Crown Transfers Act*.

25. In other words, while the purpose may be the same, the activities encompassed by the two provisions are not similar. Just as "business" and "undertaking" are neither conceptually nor in fact synonymous, the definition of "part" of an undertaking cannot be the same as that of "part" of a "business" but must take into account the different ways in which government carries out its functions and in which it acts as an employer. As "undertaking" is broader than "business", so may "part" of an undertaking be broader than "part" of a business. The notion of a coherent and severable portion of a business, in the sense of one store of many, which is applicable under section 63, is not necessarily appropriately transferred to the *Crown Transfers Act*. A program or project may be comprised of several distinct functions which can be severed but which do not constitute anything resembling a microcosm of the whole. Thus the operation of Algonquin Park consists in providing services to the users of the Park which make the Park's use possible in the first place or more enjoyable or complete, as well as services which enable

the government to benefit from the operation of the Park, among other things. These activities are severable in the sense of being easily identifiable as distinct services, but they mean very little on their own and are not analogous to the manner in which the Board has generally defined “part” of a business under section 63. That does not make them any less “part” of the undertaking of operating the Park, however, since in reality the operation of the Park can be seen only as comprised of these different services or functions.

See also *The Ministry of Natural Resources*, [1986] OLRB Rep. March 331.

51. Under section 2(1) of the Act, an employer is bound by the collective agreement between the Union and the Crown where an undertaking is transferred from the Crown to the employer and the Union has a collective agreement with the Crown in respect of employees employed in the undertaking. In determining the scope of this provision, we have not found *Metropolitan Parking Inc.*, *supra*, to be of assistance as that case was decided in the context of what is now section 63 of the *Labour Relations Act*, which provision is narrower in scope than section 2(1) of the *Successor Rights (Crown Transfers) Act*. Moreover, we do not read that case as authority for the proposition that if contracting out certain activities does constitute a sale of a business for successorship purposes, contracting out those activities to a different contractor after the first contract expires or is terminated will not constitute such a disposition.

52. It was not suggested in respect of any of the six applications presently before us that no “undertaking” was involved. Indeed, counsel for the Crown acknowledged that it would be very difficult to distinguish the subject matter of the contracts in *KBM* and *Charmaine* from the subject matter of the contracts in the instant applications. Having regard to the breadth of the section 1(1)(h) definition of that term and to the principles set forth in those decisions, we are satisfied that the subject matter of each of the contracts is an “undertaking” within the meaning of the Act. The aforementioned janitorial services contracted out by the M.G.S. to Forbes are not materially different (although somewhat more extensive) than those contracted out by the M.N.R. to Charmaine’s Janitorial Services in the case quoted above. Just as the provision of janitorial services in a particular portion of Algonquin Park constituted a part of a Crown enterprise or work, the provision of janitorial services in respect of the Centre constitutes part of that institution, and also part of the M.G.S. enterprise or program of providing property management and maintenance services in respect of various Crown operations, including the Centre. Similarly, the M.N.R.’s contracting out of the operation and maintenance of M.L.A.P. and R.L.A.P. parallels the contracting out which occurred between the M.N.R. and Hal Luckasavitch, as described in paragraphs 16 and 17 of *Charmaine*, and which was found (in paragraph 26) to constitute an undertaking. The same is true of the garbage pick-up and disposal services covered by the M.N.R.’s contract with Mr. Lightfoot. The provision of such services, without which the operation of the park would be undermined, constitutes part of the enterprise or work carried on by the M.N.R. known as Emily Provincial Park. The marking and tallying of trees forms part of the M.N.R.’s forest management program, just as the lifting of nursery trees and transplanting of seedling stock described in paragraphs 12 to 14 of *Charmaine* formed part of its reforestation program. Similarly, the aforementioned snow plowing forms part of the M.O.T.’s winter maintenance program. Accordingly, we find on the totality of the evidence that the subject matter of each of the contracts is an “undertaking” within the meaning of section 1(1)(h) of the Act.

53. It is also clear from the evidence that, in each of the six applications, the undertaking has been “transferred”, within the meaning of section 1(1)(f) of the Act, from the Crown to a contractor through the contracting out procedures described above. In this regard, we agree with Union counsel’s contention that upon the expiry or termination of a contract by which the Crown has transferred an undertaking to a contractor, the undertaking reverts to the Crown. If the Crown

subsequently enters into another such contract with that contractor or a different contractor, another transfer of the undertaking occurs.

54. We turn next to the issue of whether each of the contractors to whom those undertakings were transferred was an "employer" at the time of the transfer. The definition of "employer" contained in section 1(1)(e) of the Act is not of any assistance in resolving this issue as it merely indicates that the term "means an employer other than the Crown". As indicated by the aforementioned materials to which we were referred by Crown counsel, it is certainly possible to define the term "employer" as a person or firm that employs workers for remuneration. However, to construe the term in that manner in the context of this legislation could give rise to some very anomalous results. At the time a contractor enters into a seasonal contract with the Crown, s/he might well not have any employees as there would be no work for them to perform during the off season. The relatively small amount of work available at the start of some seasonal contracts (such as those involving garbage pick-up and disposal from a provincial park) could lead a contractor to initially perform all of the work personally and to defer hiring an assistant until later in the season when the amount of work to be done increases. Even in the context of non-seasonal work, a contractor such as Mr. Forbes might elect to personally perform all of the work covered by the contract until such time as illness or the need for a vacation prompts him to hire a replacement (or to make other arrangements for the performance of the contract during his absence). In each of those instances, accepting the aforementioned definition of "employer" would result in the contractor not being bound by the collective agreement because s/he would not be an "employer" at the time of the transfer of undertaking. Indeed, such a construction might well enable a contractor to defeat the purposes of the Act by merely deferring any hiring until after the commencement of the contract. On the other hand, a contractor who personally performs the work under the contract without any assistance, but who at the time of the transfer has employees working in another location (not covered by that contract) would likely be an "employer" on the basis of the aforementioned definition, while a contractor without such employees would not. Furthermore, partnerships might obtain contracts covering a substantial amount of work and avoid the application of the Act by hiring no employees and having all of the work performed by the partners themselves. These and other such anomalies are avoided if the term "employer" is construed to be a label which the legislation uses to identify the individual, corporation, partnership, association, or other entity to which an undertaking has been transferred. The use of the term "employer" in the section 1(1)(c) definition of "collective agreement" also supports that interpretation. If, as contended by counsel for the Crown, a person or a firm without any employees is not an "employer", it would presumably follow that an agreement in writing which had been a "collective agreement" between an employer and a trade union would no longer be a "collective agreement" if the employer party ceased to employ anyone and, therefore, ceased to be an "employer". Such a result would be highly anomalous in the context of legislation that is clearly intended to provide stability in respect of bargaining rights. (See, generally, *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. March 279, paragraph 17ff.) Construing the term "employer" as a label used to identify the individual, corporation, partnership, association, or other entity to which an undertaking has been transferred is also reflective of the "fair, large and liberal construction and interpretation" which section 10 of the *Interpretation Act*, R.S.O. 1980, c.219, directs be given to every Act of the Legislature in order to "ensure the attainment of the object of the Act according to its true intent, meaning and spirit." (If, as submitted by Crown counsel, nothing in the collective agreement precludes management from performing bargaining unit work, this construction may result in the collective agreement having no material effect on the contractor's performance of the subject matter of the contract until such time as the contractor actually hires an employee. However, that is a matter for determination under the arbitration provision included in the collective agreement (or deemed to be so included by section 44 of the *Labour Relations Act*) and not by the Board in the context of the instant proceedings.)

55. For the foregoing reasons, we find that each of the six contractors in the cases presently before us was an “employer” within the meaning of section 2(1) of the Act when the aforementioned undertakings were transferred to them by the Crown. In view of our conclusion that a contractor need not have employees in order to be an “employer” within the meaning of section 2(1) of the Act, we find it unnecessary to determine whether or not an employment relationship exists between John McCormack and his fiancée.

56. The final prerequisite of section 2(1) is that the Union have “a collective agreement with the Crown in respect of employees employed in the undertaking”. In construing that phrase in the context of section 2(1), we have derived some assistance from that subsection’s omission of the words “immediately before the transfer”, which words follow that phrase in section 4(1) of the Act. The omission of those words from section 2(1) supports the Union’s contention that for that provision to be applicable there need not have been Crown employees performing the work in question immediately before it was contracted out. Indeed, as indicated above, Crown counsel acknowledged in his reply argument that performance of the work in question by Crown employees immediately prior to the transfer is not a prerequisite of section 2(1). If it were, the applications in *KBM* and *Charmaine* could not have succeeded as, in view of the seasonal nature of the work, there would not have been any Crown employees performing it immediately prior to the transfers of undertakings which occurred in those cases. Moreover, the narrow interpretation of section 2(1) on which the “lack of continuity argument” is based gives rise to a serious anomaly from a labour relations perspective. If Crown counsel’s interpretation of section 2(1) is correct, even if the Union acted as expeditiously as possible to preserve its bargaining rights by filing and successfully pursuing an application under the Act shortly after an undertaking was first transferred by the Crown to an employer by means of a contract, the Union would be unable to continue to preserve those bargaining rights if, after that contract expired or was terminated, the Crown transferred the undertaking to another employer without using Crown employees to perform any of the work in the interim. As indicated above, Union counsel contends that the word “employees” in the section 2(1) phrase “collective agreement with the Crown in respect of employees employed in the undertaking” should be interpreted to mean “those who would do the work if done by the Crown”. It is unnecessary for purposes of this decision to rule upon the validity of that proposed interpretation, which might bring within the ambit of the Act the contracting out of new functions which have never previously been performed by Crown employees. None of the applications covered by this decision involves such a situation. Snow plowing, garbage pick-up and disposal, janitorial work, operating and maintaining access points, and marking and tallying of trees have been and continue to be performed by Crown employees covered by the collective agreement between the Union and the Crown (although the number of Crown employees performing such work has been reduced by contracting out). Without attempting to provide a definitive interpretation of the phrase in question, we are satisfied that it is at least broad enough to encompass situations in which the Union has historically had, and has at the time at which the contract transfers the undertaking to an employer, a collective agreement with the Crown in respect of Crown employees who perform the type of functions covered by the contract, irrespective of whether such functions are actually being performed at that time. This interpretation affords due recognition to the aforementioned difference in wording between sections 2(1) and 4(1), and does not give rise to the aforementioned anomaly. Moreover, it is also reflective of the “fair, large and liberal construction and interpretation” which, as noted above, section 10 of the *Interpretation Act* directs be given to every Act of the Legislature. In light of our conclusion concerning the meaning of that phrase, we find no merit in Crown counsel’s submission that for section 2(1) to apply, there must be evidence that the work in question has been performed in the past by Crown employees in the precise location covered by the contract. Thus, it is irrelevant (in respect of File No. 2324-88-R) whether the M.G.S. ever used Crown employees to perform janitorial work at the Centre, as it is clear from the evidence that it has used and continues to use Crown employees to perform that same function at

other locations, and that such employees were and are covered by the Crown's collective agreement with the Union. The same is true of the tree marking and tallying described above in respect of File No. 1617-88-R. As indicated above, the M.N.R. has done tree marking and tallying in the Lindsay District every year for at least the past six years, but the locations in which it has been performed have changed each year in accordance with the nature of the Ministry's forest management program, which requires different areas to be planted and tended at different times. To adopt in such a context the approach suggested by Crown counsel would be to unduly narrow the scope of the Act and thwart the attainment of its object of preserving bargaining rights in the context of the transfer of an undertaking from the Crown to an employer.

57. In view of our conclusion concerning the scope of section 2(1) of the Act, we find it unnecessary to determine whether or not the Union abandoned bargaining rights in respect of any of the contracts entered into between the Crown and contractors prior to the contracts covered by the instant applications. Assuming without deciding that such abandonment did in fact occur, the Union's bargaining rights in respect of those undertakings were restored each time the undertakings reverted to the Crown upon the expiry or termination of the contracts by which they were transferred. (In this regard we reiterate that it was not disputed that, as a matter of law, there can be no abandonment of the bargaining rights which the *Crown Employees Collective Bargaining Act* has conferred upon the Union vis-a-vis the Crown in respect of Crown employees.) Thus, the contracts covered by these six applications each transferred an undertaking from the Crown to an employer at a time at which the Union had a collective agreement with the Crown in respect of employees employed in the undertaking, and thereby created a fresh opportunity for an application under the Act unaffected by any earlier abandonment of bargaining rights by the Union.

58. For the foregoing reasons, these six applications are granted, and the Board hereby declares that, by virtue of section 2(1) of the Act, the respondents Barry Lightfoot, John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services, John McCormack, Elsie McCormack, Wayne Forbes c.o.b. as Forbes Janitorial Services, and Dunning Paving Limited, are each bound by the collective agreement between the Union and the Crown (as represented by the Management Board of Cabinet).

DECISION OF BOARD MEMBER J. A. RUNDLE; July 18, 1989

1. I find that I must respectfully dissent from the majority decision. I am of the view that there has been no transfer of an undertaking within the meaning of section 2(1) of the Act in any of these six applications. In this regard, I concur with the following comments made by my colleague Board Member F. Burnet in his dissent in *KBM*:

2. The wording of [the *Successor Rights (Crown Transfers) Act*] clearly and specifically defines the kind of "transfers" (of a "business, enterprise, institution, program, project, work, or a part of any of them") that trigger section 2. Only those transfers which constitute a "conveyance, disposition or sale" trigger the section.

3. Each of these latter three terms has a precise legal meaning. A "conveyance" denotes a transfer of title; a "disposition" means the parting with, alienation of, or giving up of property; and "sale" is a contract in which one party transfers to the other, for payment, title and possession of property. These are closely related concepts and each of them connotes an ultimate divestiture or an alienation of rights. By their exclusive use in section 2, they impart to the general and imprecise word "transfer", the foregoing explicit meanings - and only those meanings.

4. The facts and circumstances surrounding this transaction are fully set forth in the majority award. Clearly, there was a re-assignment of work from the Ministry to KBM, but equally clearly, there was not a "transfer" within the explicit definition of that term. There was no con-

veyance, there was no disposition, and there was no sale within the legal meaning of those terms. No titles changed hands in respect of land, equipment, goodwill, or any other assets or property, whether tangible or intangible; nor any alienation or surrender of property; nor any payment allied to such transactions. Since there was no “transfer” within the defined meaning of that term, whether or not the transaction met the definition of “undertaking” in the Act is not pertinent.

5. In paragraph 10, the majority notes the difference in wording between the relevant sections of the Crown Act and the *Labour Relations Act*, and because of that difference concludes that in this case, the Board is not limited by its established interpretation of section 63 of the latter Act. I note however that while the general purpose and intent of the two provisions is the same, the wording of the Crown Act is, if anything, more precise and limiting, in that the word “transfer” is the very word that is being defined and made specific. In the *Labour Relations Act* “transfer” is but part of the definition of the operative word “sell”, and its precise meaning is influenced if not determined by the companion words “lease” and “disposition”. I conclude that the different wording of the Crown Act is not intended nor does it broaden the meaning relative to the *Labour Relations Act*, but simply expresses the same intent more precisely. That being so, to whatever extent the jurisprudence under the *Labour Relations Act* is applicable to the Crown Act on this issue, it is not limited by the difference in the construction of the two sections.

6. The successor rights provisions of the *Labour Relations Act*, which preceded the Crown Act were intended to preserve bargaining rights when there was a change in business ownership or in the legal entity representing the business. They were not intended to curtail or govern subcontracting practices, which might be undertaken for a variety of legitimate business reasons, including not only labour cost considerations but such objectives as stabilization of employment levels in a fluctuating work load situation, reduction of capital costs, the securing of skills not otherwise available internally, meeting peak customer demand, or, as in this case, an improvement in quality. The control of such practices is left to the bargaining process and their enforcement is through the agreements’ dispute settling provisions. The distinction between the two comments has been carefully set forth in jurisprudence, notably, *The British American Bank Note Company*, [1979] OLRB Rep. Feb. 72 at page 74:

There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. *While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.*

[emphasis added]

Similarly in *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293 at page 1295, the Board in dismissing an application commented:

Given the purpose and broad language of section 63, the Board has given the section a liberal interpretation and not placed undue reliance on the legal form which a business disposition happens to take. This does not mean, however, that every business decision which prejudicially affects a Union’s bargaining rights will be viewed as falling within the ambit of section 63. In particular as the Board indicated in the *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193, the transfer of work standing by itself will generally not be sufficient to trigger the application of section 63.

Given the identity of intent and meaning of the two Acts, I think this jurisprudence has equal application to this case.

7. Finally, if the simple and straightforward sub-contracting operation here involved is to be governed by the successor rights provisions of the Act, it becomes difficult indeed to think of any instance of sub-contracting that would not trigger the section. As a practical matter there-

fore, the consequence would be to virtually ban sub-contracting. If so sweeping a departure from established business practice and from established Board interpretations and jurisprudence had been intended by the particular wording chosen for the Crown Act to govern Crown enterprises, surely it would have been publicly debated and specifically provided in the legislation in unequivocal terms, and not left to controversial judicial interpretation.

Accordingly, I would dismiss all of the applications on the grounds that there has been no transfer of an undertaking in any of them.

2. I would also dismiss all of the applications with the exception of File No. 2335-88-R on the basis that none of the contractors in those applications is an “employer”. Unlike section 63 of the *Labour Relations Act* which refers to the successor as the “person to whom the business has been sold”, section 2(1) refers to the successor as the “employer”. The wording of section 4(1) of the Act also suggests that “person” and “employer” were intended to have different meanings in the context of this legislation; after referring to “an employer”, it refers to “any person, employee organization, trade union or council of trade unions”. As indicated in the majority decision, the definition of “employer” contained in section 1(1)(e) of the Act is not of any assistance in resolving this issue as it merely indicates that the term “means an employer other than the Crown”. However, the dictionary definitions to which the Board was referred by Crown counsel are of assistance in construing this term. Having duly considered the submissions of counsel and those definitions, I have concluded that, with the exception of the section 1(1)(e) exclusion of the Crown, in the context of this legislation the term “employer” was intended to mean a person or firm that employs a worker or workers for remuneration.

3. I would also dismiss the application in File No. 2335-88-R because I am of the opinion that the Union has abandoned any bargaining rights which it may have had in relation to snow plowing in Patrol Number 16 of the Ministry of Transportation’s London District.

1585-88-JD International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Complainant v. **E. S. Fox Limited**, Pro Insul Limited, Sheet Metal Workers International Association, Local 562, Respondents v. Ontario Sheet Metal Workers’ and Roofers’ Conference, Intervener #1 v. Ontario Sheet Metal and Air Handling Group, Intervener #2 v. Master Insulators’ Association of Ontario Inc., Intervener #3

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Work in dispute involving the application of aluminum cladding or lagging over insulation applied to oven circulation ducts - Sheet Metal Union arguing that it would be unlawful for the Board to assign the work in dispute to persons who are not journeymen or apprentice sheet metal workers - *Apprenticeship Act* not stipulating that certain work can only be done by certain people - Board not prepared to find as a preliminary matter that the work could be done lawfully only by journeymen or apprentice sheet metal workers

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members W. Gibson and C. A. Ballentine.

APPEARANCES: David McKee and Joe De Wit for the complainant; W. J. McNaughton for the respondent E. S. Fox Limited; L. A. Richmond, G. Ward and C. Coffin for the Sheet Metal Work-

ers; *Peter Chauvin* and *Lou Cianfarani* for the Ontario Sheet Metal Workers and Ontario Sheet Metal and Air Handling; *Mark Contini* and *Ray Kurki* for the Master Insulators' Association and for Pro Insul Limited.

DECISION OF THE BOARD; July 21, 1989

1. This is a jurisdictional dispute filed under section 91 of the *Labour Relations Act*. The work claimed to be in dispute by the applicant ("Local 95") is the application of aluminium cladding or lagging over insulation applied to oven circulation ducts in the paint shop of the Toyota plant in Cambridge, Ontario. The respondents E. S. Fox Limited ("E. S. Fox") and Pro Insul Limited ("Pro Insul"), and the interveners Masters Insulators' Association of Ontario Inc. ("Master Insulators") and the Ontario Sheet Metal and Air Handling Group (the "Sheet Metal Group") agree with the applicant's description of the work in dispute. The respondent Sheet Metal Workers International Association, Local 562 ("Local 562") and the intervener Ontario Sheet Metal Workers' and Roofers' Conference (the "Sheet Metal Conference") agree that the work in dispute includes that which is described by Local 95 but add that it also includes "all work related thereto, including the application of insulation material, preparatory to applying the cladding or lagging". It therefore appears that Local 562 and the Sheet Metal Conference are attempting to "up the ante" by expanding the work in dispute.

2. Further, as a preliminary matter, Local 562 and the Sheet Metal Conference, supported by the Sheet Metal Group, submit that the Board cannot, as a matter of "jurisdiction, law and public policy" (to the use the words of Mr. Richmond) grant the relief sought by the applicant (namely: (a) a declaration that E. S. Fox properly subcontracted the work in dispute to Pro-Insul and that the work was properly assigned to members of Local 95; and (b) a direction that E. S. Fox continue to subcontract the work in dispute to contractors bound to a collective agreement with Local 95, or assign it directly to members of Local 95). They submit that the work in dispute (as set out by the applicant) is the work of the sheet metal trade, which is a compulsory certified trade pursuant to the provisions of *Apprenticeship and Tradesmen's Qualification Act* R. S. O. 1980, Chapter 24 (the "*Apprenticeship Act*"), and that it would therefore be unlawful for anyone, including the Board, to assign, or to direct the assignment of, the work in dispute to persons who are not journeymen or apprentice sheet metal workers within the meaning of the *Apprenticeship Act*. Because, they argue, the work in dispute can only be assigned to such sheet metal workers; that is, to members of Local 562 in this case, this complaint cannot succeed and ought to be dismissed without a hearing on the merits.

3. Local 95 does not concede that the work in dispute is the work of the sheet metal trade as defined in Regulation 57 to the *Apprenticeship Act*, and, further, that the Board cannot determine whether or not it is the work of a sheet metal worker or in the sheet metal trade in the absence of evidence with respect to how and by whom such work is done in practice. Indeed, Local 95 submitted that the Board need not determine that issue in this proceeding at all. It argued that the view of the *Apprenticeship Act* taken by Local 562 and the Sheet Metal Conference is overly technical and narrow, and that it does not reflect the purpose of that legislation. Further, it argued, the *Apprenticeship Act* and its Regulations themselves permit persons who are not sheet metal workers to do the work in dispute.

4. In his very able argument, counsel for Pro Insul and Master Insulators' agreed with Local 95's submissions and added that it would be inappropriate for the Board to dismiss this complaint on the basis of an assumption that it was or would be unlawful for an employer to assign the work in dispute to anyone who is not a journeymen or apprentice sheet metal worker; that is, that the Board should determine that issue, if at all, only with the benefit of evidence with respect

thereto. Further, argued Mr. Contini, the *Apprenticeship Act* does not preclude a person who is neither a journeyman nor an apprentice sheet metal worker from doing sheet metal work and requires only that a person engaged in the sheet metal trade be a journeymen or apprentice sheet metal worker. It is on that basis also that he sought to distinguish the *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594 line of cases upon which Local 562 and the Sheet Metal Conference relied.

5. Counsel for E. S. Fox concurred with the arguments of Local 95 and Mr. Contini, and reminded us that the Board takes its jurisdiction from the *Labour Relations Act* and that other legislations must be considered by the Board only to the extent that it impacts directly on the determinations which it must make. In this complaint, he pointed out, the Board was being requested to in effect confirm an assignment which had already been made as opposed to directing an assignment of the work in dispute.

6. In reply, Mr. Richmond submitted that the issue before the Board is whether or not it is satisfied that members of Local 95 are not qualified to and therefore cannot perform sheet metal work. He argued that there is no difference between working in the sheet metal trade and doing sheet metal work, and that the *Apprenticeship Act* must apply to everyone and not just to sheet metal workers if it is to have any meaning.

7. Sections 1(a), (b), 9, 11, 26(1), and 28 of the *Apprenticeship Act* provide that:

1. In this Act,

- (a) "apprentice" means a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade;
- (b) "certified trade" means a trade designated as a certified trade under section 11;

9.-(1) Every person who commences *to work at a trade* for which an apprentice training program is established but who does not hold a certificate of apprenticeship or qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and
- (b) within three months after commencing to work in that trade, file with the Director his contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of the period of three months mentioned in clause (1)(b), cease to work in that trade until he files with the director his contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

11.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), *shall work or be employed in a certified trade* unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), *in a certified trade* unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the

time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfied the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

26.-(1) Every person,

- (a) who contravenes any provision of this Act or the regulations;
- (b) who fails to carry out the terms of a contract of apprenticeship under this Act;
- (c) who enters into a contract or arrangement relating to the employment of an apprentice that is not in accordance with this Act;
- (d) who withholds any information with regard to the working or training conditions of apprentices or makes any misrepresentation with regard thereto;
- (e) who obstructs, hinders, prevents or otherwise interferes with the carrying out of this Act or the regulations or the terms of a contract of apprenticeship under this Act; or
- (f) who uses for the purpose of obtaining employment or business a certificate of apprenticeship, a certificate of qualification or a certificate of proficiency issued to another person,

is guilty of an offence and on conviction is liable to a fine of not more than \$1,000.

28. The Lieutenant Governor in Council may make regulations,

- (a) defining any trade;
- (b) establishing an apprentice training program for any trade or group of trades;
- (c) exempting any trade or class of persons in a trade from this Act and the regulations or from any provision of either of them;
- (d) providing a system of proficiency certificates for any trade not designated as a certified trade under section 11;
- (e) providing for approval by the Director of apprentice training programs established by employers;
- (f) providing licences for trade schools teaching any trade to which this Act applies and respecting their issue and prescribing courses of study and methods of training in such trade schools and respecting their operation;
- (g) respecting the periods of apprenticeship, qualifications and training of apprentices in any trade;
- (h) approving or prescribing courses of training or study for apprentices, and fixing the credits to be allowed for such courses;
- (i) prescribing, in respect of any trade, rates of wages for applicants for apprenticeship or apprentices or any class of applicants or apprentices;

- (j) prescribing the maximum number of persons who may be apprenticed to an employer in a trade;
- (k) respecting the ratio of apprentices to journeymen who may be employed by an employer in a trade;
- (l) providing for Interprovincial Standards Examination and standing thereunder and for the recognition of certificates or standings granted under Interprovincial Standards Examinations in other provinces and the granting of certificates of qualifications pursuant thereto;
- (m) providing for the granting of provisional certificates of qualification and the grounds therefor and the conditions thereof;
- (n) respecting the renewal of certificates of qualification that have expired without being renewed and the conditions of renewal;
- (o) providing for the issue of certificates of qualification or licences to persons who certificates or licences have been cancelled and the conditions upon which they may be issued;
- (p) respecting the making, registration or transfer of contracts of apprenticeship;
- (q) requiring and providing for the posting up in employers' premises of extracts from this Act or the regulations;
- (r) defining any expression used in this Act for the purposes of this Act;
- (s) providing for the prescribing fees;
- (t) prescribing forms and providing for their use.

[emphasis added]

Regulation 36, R.R.O. 1980 under the *Apprenticeship Act* provides, in sections 5 and 6(1) that:

5.-(1) Sections 9 and 10 and subsection 11(2) of the Act do not apply to persons,

- (a) permanently employed in an industrial plant while performing work entirely within the plant and premises or on the land appertaining thereto, except work performed in the maintenance and repair of motor vehicles, trailers or conversion units registered for use on a highway under the *Highway Traffic Act*; or
- (b) while engaged in a trade or occupation that in the opinion of the Director is not one in respect of which compliance with sections 9 and 10 and subsection 11(2) of the Act is required.

(2) Sections 9 and 10 of this Act and section 10 of this Regulation do not apply to each person who is engaged in a trade for which an apprenticeship training program is established by an employer and approved by the Director.

• • •

TRAINING AND INSTRUCTION

6.-(1) The Director may approve an apprentice training program established by an employer if, in the opinion of the Director, the program,

- (a) is of sufficient duration and content to warrant a training program;
- (b) contains both practical work and related units of study;

- (c) meets or satisfies a perceived need of an employer; and
- (d) provides a marketable skill in an identifiable occupation.

Regulation 57, R.R.O 1980 under the *Apprenticeship Act* designates the trade of sheet metal worker as a compulsory certified trade and provides, in section 1(b):

1. In this Regulation,

- (b) “sheet metal worker” means a person who,
 - (i) manufactures, fabricates, assembles, handles, erects, installs, dismantles, reconditions, adjusts, alters, repairs or services all ferrous and non-ferrous sheet metal work of No. 10 U.S. Gauge or of any equivalent or lighter gauge and all other materials used in lieu thereof; and
 - (ii) reads and understands shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches,

but does not include a person employed in production commonly known as mass production.

It also provides schedules of “in-school” and “work experience” training. In the result, a person must be either a journeyman or apprentice in the sheet metal trade, within the meaning of the *Apprenticeship Act* or Regulations thereunder, in order to be able to lawfully work or be employed in the sheet metal trade in Ontario.

8. The *Apprenticeship Act* is a statute of general application in the Province of Ontario. In our view, its purpose is to regulate the training and qualifying of tradesmen, and to regulate the employment of persons in compulsory trades. Although it is not within the Board’s mandate to enforce the *Apprenticeship Act per se*, the Board is obligated to make decisions and proceed in ways which are not inconsistent with laws of general application which are specifically directed at matters with which the Board must be concerned in the course of exercising its powers or performing its duties under the *Labour Relations Act* (see *McLeod et al. v. Egan et al.* (1974) 56 D.L.R. (3rd) 150 (Supreme Court of Canada); *Re Ontario Hydro and Ontario Hydro Employees Union, Local 1000 et al.*, (1983) 41 O.R. (2d) 669 (Ontario Court of Appeal)).

9. Consequently, in applications for certification under section 144(1) of the *Labour Relations Act* in which the applicant is a construction industry trade union designated to represent in bargaining in the ICI sector of the construction industry persons engaged in a compulsory certified trade under the *Apprenticeship Act*, the Board has found it appropriate to describe the bargaining unit in terms of the journeymen and apprentices in that trade, and to include in such bargaining units only employees who are either such journeymen or apprentices (see, for example, *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra*, *C T Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing and Siding Ltd.*, [1985] OLRB Rep. Apr. 549; *Naylor Group Incorporated*, [1986] OLRB Nov. 1559 and [1986] OLRB Rep. Nov. 1563; *P & M Electric (1982) Ltd.*, *Northland Electric (Ont.) Limited*, [1989] OLRB Rep. June 638. At paragraphs 10 and 11 of this decision in *P & M Electric (1982) Ltd.*, *supra*, the Board commented that:

10. In our view, it would be inconsistent with the *Apprenticeship and Tradesmen’s Qualification Act* for the Board to find that persons who are neither qualified journeyman nor apprentices, within the meaning of that legislation to be in a bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings before the Board. Further, the issue

of community of interest in trade or craft bargaining units is determined primarily on the basis of the skills and working conditions which are characteristic of employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development and operation of businesses and trade unions in that industry along trade or craft lines. Both the structure of the *Labour Relations Act* and the Board's approach to the construction industry recognize that (see *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, particularly at paragraphs 37-46). In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen's Qualification Act*.

11. The Board is also satisfied that there is no reason to not give the terms "journeyman" and "apprentice" the same meaning in proceedings before the Board as those terms have under the *Apprenticeship and Tradesmen's Qualification Act*. Consequently, it would be redundant to use words such as "qualified", "certified" or "registered" to describe either journeyman or apprentice electricians.

10. The question before the Board as a preliminary matter in this case is somewhat different however. In certification proceedings, the question which the Board sometimes faces is which employees are in the bargaining unit. In applications with respect to journeymen and apprentice electricians, for example, the question is whether persons employed by the respondent were journeymen or apprentice electricians, and performing work in that trade on the date of application. The preliminary issue in this proceeding is whether anyone other than a sheet metal worker, that is, a journeyman or apprentice in that trade, can lawfully do the work in dispute, which it is asserted by Local 562 and the Sheet Metal Conference is sheet metal work.

11. If the world of the construction industry was one in which there was no overlap between the jurisdictions of the various construction crafts or trades, it would probably be both a much simpler world, and also fair to say that doing the work that is done by a trade is equivalent to working in or being engaged in that trade. However, as the Board observed in *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, the lines of demarcation between the jurisdictions of the various construction industry trade unions have never been clear and, have, in recent years, tended to become even more blurred. Trade union jurisdictions in the construction industry have always overlapped. If anything, these overlaps have increased in recent years.

12. In our view, the *Apprenticeship Act* was not intended to and has not had the effect of eliminating or lessening these jurisdictional overlaps. It does not stipulate that certain work can only be done by certain people. It does not specifically prohibit anyone from doing any particular kind of work, whether or not such work is a part of the work done by persons engaged in a compulsory certified trade. In that regard, the regulations under the *Apprenticeship Act* are full of overlaps between the trades with respect to which they have been promulgated. For example, there is an obvious overlap between the qualifications and the work of the various kinds of mechanics regulated under the *Apprenticeship Act*. There appears to be a similar overlap, in terms of training and work performed, between plumbers, (also a compulsory certified trade) and refrigeration and air-conditioning mechanics (which is a compulsory certified trade); between plumbers, steamfitters (also a compulsory certified trade) and fire protection installers; and between the electricians (another compulsory certified trade) and air and refrigeration mechanics. More apposite to this case, a review of the regulations reveal that auto body repairers (Regulation 22), construction millwrights (Regulation 29), electricians (Regulation 32), glaziers and metal mechanics (Regulation 39), ironworkers (Regulation 44), lathers (Regulation 45), painters (Regulation 50), plumbers (Regulation 52), refrigeration and air conditioning mechanics (Regulation 55), steamfitters (Regulation 59), and truck trailer repairers (Regulation 62) all clearly or very arguably are trained to use and do use

sheet metal or sheet metal tools in the performance of the work of their trade. In addition, Regulation 36 under the *Apprenticeship Act* provides for the establishment of employer specific apprenticeship training programmes to which sections 9 and 10 of the Act do not apply. One such programme is for heat and frost insulation and asbestos workers of the "Joint Apprentice Committee" (a joint committee of labour and management rather than a single employer) clearly provides for persons enrolled in it to be trained to use, among other things, sheet metal and sheet metal tools in the performance of their work.

13. It is readily apparent that the *Apprenticeship Act* does not provide any trade, even a compulsory certified trade, with an exclusive trade jurisdiction. We do not view Regulation 57 under the *Apprenticeship Act*, which must be read in the context of that Act and its regulations as a whole, as requiring that any person who does anything with sheet metal in the construction industry be a journeyman or apprentice sheet metal worker. It does prescribe that anyone who works as a sheet metal worker or in the sheet metal trade must be a journeyman or apprentice. However, because of the overlap of craft or trade jurisdictions in the construction industry, and in the regulations of trades by the *Apprenticeship Act*, the question of which trade a person is engaged in is not necessarily determined by the work that that person is doing at any particular time. In order to determine the trade in which a construction employee is working, it is essential to consider *all* of the work that the employee is qualified to or does do and not merely that part of his/her work which falls within the description of work done by a compulsory certified trade, particularly where such work clearly or arguably falls within an overlap between the jurisdiction of two or more trades (see *Ellis Don Limited, supra*). Consequently, the mere fact that a construction employee uses a particular material(s) or tool(s) in his/her work from time to time is not necessarily determinative of what trade that employee is in. Concomitantly, the mere fact that a person sometimes does what a sheet metal worker also sometime does, or sometimes uses sheet metal or sheet metal tools in the course of his/her employment or work, does not necessarily mean that that person is a sheet metal worker or that s/he is engaged in the sheet metal trade within the meaning of the *Apprenticeship Act*.

14. Local 562 is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the *Labour Relations Act*, on April 28, 1986, the Sheet Metal Workers' International Association and the Sheet Metal Conference are designated as the employee bargaining agency to represent in bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry in Ontario all journeymen and apprentice sheet metal workers represented by any of their affiliated bargaining agents. However, this employee bargaining agency is also designated to so represent sheeters, sheeters' assistants, and material handlers represented by any of its affiliated bargaining agents.

15. In addition, the provincial agreement between the sheet metal employer and employee bargaining agencies also appears to cover employees other than journeymen and apprentice sheet metal workers; namely, probationary employees, material handlers, sheeters/deckers and sheeters/deckers assistants. At least some of the persons employed under this provincial agreement in these latter four classifications are neither journeymen nor apprentice sheet metal workers. However, they are employed under that provincial agreement to perform work which Local 562 considers to be sheet metal work.

16. In the result, and assuming, without finding, that the work in dispute in this case (or any of it) is "sheet metal work", we are not persuaded that we should find, as a preliminary matter, that it could be done lawfully only by journeymen or apprentice sheet metal workers. In our view, it would not be appropriate to make such a finding without the benefit of a full hearing on the merits of this complaint unless it was absolutely clear that it was so. In this case, the nature of the con-

struction industry and the trade jurisdiction overlaps therein, the conduct of the sheet metal employee bargaining agency and its affiliated bargaining agents in representing persons who are neither journeymen or apprentice sheet metal workers but who perform what they consider to be sheet metal work, the structure of the *Apprenticeship Act* and the Regulations thereunder, and the nature of the evidence which Local 95, Pro Insul and Masters Insulators seeks to adduce with respect to the practice they assert is applicable to this complaint make it far from clear that the submissions of Local 562 and the Sheet Metal Conference are correct. Consequently, the motion is dismissed, but without prejudice to the matter being raised again in final argument.

17. The Registrar is directed to schedule this application for hearing unless, within two weeks the date hereof, the parties, or any of them indicate (in writing) that a further pre-hearing conference is both desirable and potentially useful, in which case the Registrar may schedule a further pre-hearing conference. Any such further pre-hearing should deal with a number of hearing days which will be required in the scheduling of such dates. In that regard, the parties are directed to provide their available dates for hearing between October 1, 1989 and April 30, 1990 within three weeks of the date hereof whether or not they wish a further pre-hearing conference or when it is scheduled, failing which the Board may set the dates on which this matter will be heard without further notice or consultation with them.

**2409-88-G International Brotherhood of Electrical Workers, Local 353, Applicant
v. E. S. Fox Limited, Respondent**

Construction Industry - Construction Industry Grievance - Discharge -Grievor fired by subcontractor because general contractor would not allow him to work on the job site in its belief that he had let off a firecracker -Whether grievor fired without just cause contrary to collective agreement -Subcontractor having cause to fire employee where the general contractor refuses to permit the employee to continue on the job - Circumstances indicating no just cause not present here - Grievance dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *L. Steinberg* and *R. Gill* for the applicant; *W. J. McNaughton* and *J. Howes* for the respondent.

DECISION OF THE BOARD; June 28, 1989

1. The International Brotherhood of Electrical Workers, Local 353 ("the union") has referred a grievance in the construction industry for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*. The grievance alleges that E. S. Fox Limited ("the employer" or "Fox") terminated the employment of the grievor, Steward Loughheed, on June 27, 1988, without just cause contrary to clause 400 of the collective agreement binding upon Fox and the union. The reply to the referral denies the grievance and states:

The grievor was barred from the [T.T.C. garage] site by the general contractor. The grievor, prior to being barred from the site, had been offered and accepted a position as a foreman at another job site of the respondent. Of his own volition, the grievor required that he be transferred back to the site from which he had been barred when he knew or ought to have known that he was not allowed on the job site.

2. Fox and the union are bound to the provincial agreement between the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario and the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario which expires April 30, 1990 ("the Agreement"). Clause 400 of Section 4 - Management Rights of the Agreement states:

400 RIGHT TO MANAGE

Subject to the terms of this Agreement, the Union acknowledges the right of the individual contractor to manage the business in which he is engaged and to direct the working forces, to discharge or discipline employees for just cause.

3. Lougheed was employed by Fox as a journeyman electrician on or about March 3, 1988, on a construction project at a maintenance garage of the Toronto Transit Commission ("the T.T.C. job"). He was also the union's job steward and safety representative on the project. Fox was a subcontractor to Dineen Construction, the general contractor for construction of the garage. On June 6th, Lougheed was working along with other journeymen electricians and apprentices in the office area of the garage. Toward the end of the day, there was an incident involving the letting off of some firecrackers. It was observed by two of Dineen's labourers. They reported the incident to Dineen's site superintendent, Steve Orr. Orr advised Tony DeSousa, foreman of Fox's electrical crew, that Dineen's employees had seen Lougheed throwing firecrackers. Orr and DeSousa visited the office area together, but, by then, none of Fox's electrical crew were present. Orr told DeSousa that Lougheed's behaviour was unacceptable and that he would not be allowed back on the site. DeSousa informed Orr that Lougheed was being transferred the next day, June 7th, to another Fox job.

4. Immediately after the incident, DeSilva asked two apprentice electricians and a foreman electrician about it. They were on Fox's electrical crew working in the office area at the time of the incident. DeSousa testified that the apprentices told him that they did not see who threw the firecrackers, but the foreman had told him it was Lougheed. The foreman was not called as a witness and the evidence falls short of establishing that he could have seen who let off the firecrackers.

5. Fox had another project in Brampton ("the AMC job") and, prior to June 6th, Lougheed had accepted a transfer to that job as foreman. He had been requested for the job by David McVittie, Fox's project co-ordinator on the AMC job. Lougheed reported to the job site on June 7th. The same day, at the T.T.C. job, Orr gave DeSousa a memorandum from Orr for delivery to Dave Leblanc, to whom it was addressed. Leblanc was Fox's project co-ordinator for the T.T.C. job. The memorandum referred to the firecracker incident of June 6th as hazardous horseplay which Dineen would not tolerate. The memorandum ended with the statement "[w]ith concern for safety it is requested that Stew Lougheed be removed from our site."

6. Lougheed did not remain on the AMC job, however. About a week after he went to the job, DeSousa was told by McVittie that Lougheed, at his own request, was no longer foreman on the job and wished to return to the T.T.C. job. DeSousa told McVittie that Dineen would not allow Lougheed back on site and sent McVittie a photocopy of Orr's memorandum. DeSousa got another telephone call from McVittie on June 24th. This time McVittie told DeSousa that Lougheed would be reporting to the T.T.C. job on June 27th. DeSousa reminded McVittie of Orr's memorandum and the fact that Dineen would not let Lougheed on the site. He told McVittie to keep Lougheed at the AMC job. Following that exchange, DeSousa asked Orr whether Lougheed could work on the site and was told he could not.

7. McVittie did not keep Lougheed at the AMC job site and when he reported to the

T.T.C. job on June 27th, DeSousa showed him Orr's memorandum. Lougheed did not read it. Their versions of what happened at this point agree on the fact that DeSousa told Lougheed that Dineen would not let him on the job site and that he was fired, but conflict on whether DeSousa told Lougheed why Dineen would not allow him to work on the T.T.C. job and on whether DeSousa gave Lougheed a choice between being fired or returned to the AMC job. Having reviewed and weighed their testimony about the circumstances in which Lougheed reported for work on June 27th and left the site without being allowed to start work, the Board accepts DeSousa's evidence that he read to Lougheed the memorandum from Orr which requested that Lougheed be removed from the T.T.C. job because he had engaged in hazardous horseplay which Dineen would not tolerate.

8. With respect to whether Lougheed was given a choice between being fired or returned to the AMC job, Lougheed disputes that he was told that he could return to that job and, in any event, claims that there was no work to return to because McVittie had laid him off from that job. Lougheed's evidence that he was laid off from the AMC job was corroborated by the evidence of his foreman at the job. Their evidence on that point was unchallenged in cross-examination. It is undisputed that Fox was obligated by the Agreement to take Lougheed back on the T.T.C. job if there was no work for him on the AMC job. This was because the Agreement gave Lougheed a preferential claim to the work over electricians who were working on the job under travel cards and work permits issued by the union.

9. It is quite possible DeSilva offered Lougheed the choice of returning to the AMC job or being fired because he clearly harboured the opinion from his first conversation with McVittie that Lougheed had been returned to the T.T.C. job at his own request. Clearly, however, Lougheed did not return to the T.T.C. job at his own request. The unchallenged evidence is that he was laid off from the AMC job because there was no work there for him. It was not argued that the employer was prepared to return Lougheed to that job in spite of the lack of work. Therefore, even if DeSousa did offer Lougheed the alternative of returning to the AMC job and even if Lougheed rejected that alternative, it cannot be said that he chose to be fired because the alternative did not exist. Since his employer did not have the option of laying Lougheed off at the T.T.C. job as long as there were travellers and permit card electricians on the job, Fox had to fire Lougheed if Dineen in fact had told Fox that Lougheed could not work on the T.T.C. job. The Board is satisfied on all of the evidence that Lougheed was told that he was being fired because Dineen would not allow him work access to the T.T.C. job site in its belief that Lougheed had let off firecrackers on the job.

10. Lougheed testified that he neither lit nor threw any firecrackers and had seen Gary Kyle throw one firecracker from the room where they were working together into the larger area outside of the room. Kyle was one of Fox's electricians and he testified that he had let off four firecrackers in the office area at the time in question. Another electrician, Dave Sutherland, told the Board that a firecracker exploded in another of the small office rooms where he and an apprentice were working. He turned and through the door to the room saw Kyle running away.

11. Their evidence conflicts with that of Mark van Roode who was called by Fox. Van Roode was employed by Dineen as a construction labourer. He was one of the two Dineen employees who had reported the firecracker incident to Orr and had identified Lougheed as the person who had let off firecrackers. Van Roode testified that he had heard at least three firecrackers being let off and saw Lougheed light and throw at least two of them. Under close cross-examination and upon being challenged that Kyle would testify that he had let off the firecrackers on June 6th, van Roode's unhesitating response was that he did not see Kyle throw any firecrackers and was positive that it was Lougheed whom he had seen.

12. Lougheed, Kyle and Sutherland are journeymen electricians who were working in the office area on June 6th when the firecrackers were let off. Lougheed and Sutherland were at all material times members of the union. They also worked together on the AMC job after Sutherland succeeded Lougheed as foreman on the job. Kyle worked with them on the T.T.C. job until they transferred to the AMC job. Kyle remained on the T.T.C. job until approximately two weeks after Lougheed was fired. During the time Kyle was employed on the T.T.C. job he was not a member of the union, but was working under a travel card issued by it. He transferred into the union as a member on September 1, 1988. Kyle testified that he heard nothing further about the incident until June 27th when he learned that Lougheed was being fired over the incident. He told the Board that he was stunned to learn that Lougheed was being fired for the incident and had thought, if anyone was to get "stung" for it, it would be him. Kyle admitted in cross-examination that, on June 27th, he did not tell DeSousa or anyone else from Fox that he had let off the firecrackers. He testified further that, prior to testifying at the hearing, the only person whom he had told that he had let off the firecrackers was union counsel. This was while he was being interviewed to be a witness. Van Roode had been working for Dineen as a construction labourer for approximately 10 months before the June 6th incident and continued to do so until September 1988. He was not working in the construction industry when he testified and had not worked for Dineen since he left the T.T.C. job. Van Roode had not been employed by Fox at any time prior to the hearing and was not so employed when he appeared before the Board.

13. The Board has reviewed carefully the testimony of the four witnesses and it accepts van Roode's evidence that he saw Lougheed throw at least two lighted firecrackers. Sutherland did not claim to have seen Kyle throw any, only that, through the door of the room where he was working, he had seen Kyle running away just after a firecracker had exploded beside Sutherland. The descriptions of the incident offered by Lougheed and Sutherland also differed in some of their significant details from Kyle's evidence. Kyle was evasive when questioned in cross-examination about why he had not reported to either Fox or the union that he, and not Lougheed, had thrown the firecrackers on June 6th, as he had testified. If he were to be believed, he withheld from everyone the fact that he and not Lougheed had been responsible for the firecracker incident over which Lougheed was fired until he, Kyle, was being interviewed by union counsel as a witness for this referral. It is reasonable to infer from the documents and correspondence filed with the Board that his interview would not have taken place before December 30, 1988, a lapse of at least six months from the time when Kyle became aware of Lougheed's discharge. Thus he not only kept his silence when Lougheed was discharged, he continued to withhold from everyone the testimony he now wants the Board to accept when the union served its grievance on the employer on June 27th, during the remainder of his employment with Fox and when he was accepted as a member of the union on September 1st.

14. In the Board's view, if Kyle was prepared to maintain his silence in those instances he was capable of trying to mislead this Board in order to do a favour for a union brother at a time when there was little risk of adverse consequence to himself for doing so. In the result, the Board does not believe his testimony respecting the firecracker incident.

15. Van Roode, by contrast, did not stand to benefit in any manner from his testimony. He was forthright in giving his evidence-in-chief and in cross-examination. There was nothing in the manner in which he gave his evidence or in his general demeanour which might suggest any deficiency in his ability to observe and describe the events which he had witnessed nine months earlier. He described the main elements of the incident briefly and clearly and was unshaken by intensive cross-examination. When he could not recall with certainty some detail about which he was being asked, he admitted it. The Board disagrees with union counsel that the reason van Roode gave for reporting the firecracker incident to Orr discloses an envy of or enmity toward electricians which

might colour his evidence. To the contrary, in the Board's view, he was a witness free of any interest in the outcome of the grievance and did not stand to benefit from testifying. His demeanour as a witness was consistent with that independence.

16. For all of the foregoing reasons, the Board finds that Loughheed let off at least two firecrackers on the T.T.C. job on June 6th, including the one that went off in the room where Sutherland was working. However, that does not answer the question of whether Fox had just cause to terminate Loughheed's employment. Even if the firecracker incident, which Dineen called "dangerous horseplay" was itself cause for discharge, it cannot be said that Fox terminated his employment because he had engaged in that incident. DeSousa's knowledge of the firecracker incident had not changed between June 6th, when it happened, and June 27th when he terminated Loughheed's employment. His knowledge consisted of the information from Orr that two of Dineen's employees had seen Loughheed let off firecrackers and the information from one of Fox's electrical foremen who had told him that Loughheed was the electrician who had let off the firecrackers in the incident which Orr had reported to DeSousa. Fox did not consider that incident alone to be serious enough to discharge Loughheed, since it transferred him to the AMC job as foreman. The incident only gained enough significance with Fox to become the basis for terminating Loughheed when it became necessary for Fox to comply with the direction in Orr's June 7th memorandum. Clearly, Fox terminated Loughheed's employment because the T.T.C. job was the only site at which Fox had employment for him. He could not be laid off as long as there were electricians in Fox's employment within the union's geographic jurisdiction who were on travel cards or work permits, and it could not employ him on the T.T.C. job because Dineen would not allow him work access to the site.

17. The Board disagrees with union counsel's submission that the evidence does not establish the fact that Dineen was barring Loughheed from the T.T.C. job. Whether the Board believes the employer's witnesses or the union's witnesses, there can be no doubt that there was an incident involving Fox's electricians and firecrackers on June 6th. There is no reason at all to doubt van Roode's *viva voce* evidence that he told Orr about the incident. The Board has DeSousa's *viva voce* evidence that, on June 6th, Orr reported the incident to him, told him that Loughheed's behaviour was unacceptable, that Loughheed would not be allowed back on the job and that, on June 7th, Orr delivered a memorandum to DeSousa for delivery to Fox's project co-ordinator for the job requesting that Loughheed be removed from the site. The cross-examination of DeSousa on this evidence did not disclose any flaw which would cause the Board not to rely on his evidence. The Board is satisfied, therefore, that Dineen did bar Loughheed from the T.T.C. job.

18. Counsel for the union contends that for Fox to say it was prevented by Dineen's prohibition from continuing to employ Loughheed, is not enough to fulfill its collective agreement obligations. Allowing Fox to shield itself behind Dineen in these circumstances would put Fox's commercial obligations under its contract with Dineen at a higher level of importance than its obligation under clause 400 of the collective agreement to have just cause when it discharges employees. Counsel argues that there is nothing in law which supports doing that. Furthermore, counsel submits that, in order for a general contractor's power to control its job site to be a viable defence in an alleged dismissal without just cause, the subcontractor is obligated to investigate and properly satisfy itself that the general contractor's denial of access is legitimate, something which Fox did not do in the instant case.

19. The Board was given little in the way of legal authorities by either counsel in support of their arguments. Counsel for Fox referred the Board to the head note in *Re United Plumbers and Pipe Fitters, Local 46 and Samuel Crump (Canada) Ltd.* 14 L.A.C 39 (Weatherill) which states:

Where the collective agreement is between a sub-contractor and its employees, but ultimate

control over personnel on a particular job site is vested in the general contractor, it cannot be said that the subcontractor discharges an employee without cause when the general contractor refuses to permit the employee to continue on the job, and the subcontractor has no other work available for that employee and there are no seniority provisions in the collective agreement.

Union counsel did not refer the Board to any legal authorities. He characterized *Crump, supra*, as “vintage”, doubted if it ever was the law and contended that it was not the law now. However, the Board was not instructed on what the current law was if *Crump* does not reflect it.

20. Whether or not *Crump* reflects the present law with respect to where the ultimate control over workers on construction sites is vested, it is generally accepted in the construction industry that the general contractor of a project is responsible to the project’s owner for the general security of the project. That would include responsibility for allowing access to the project to persons who have business to conduct or who have work to perform on the project, and for denying access to persons whom the general contractor wants to exclude from doing business or working on the project. In this respect, it is interesting to note that a general contractor who undertakes a project for an owner in Ontario has defined, statutory duties in respect of that project for assuring that “the health and safety of workers on the project is protected” and that “every employer and every worker performing work on the project complies with [The Ontario Health and Safety Act] and the regulations.”. *The Ontario Health and Safety Act*, R.S.O. 1980, c. 321, at s. 13. Those duties seem to reflect the reality of a general contractor’s control over its job site.

21. The Board does not know what the particular fact situation was in *Crump, supra*, but, in the instant case, there is nothing in the evidence to cause the Board not to believe that Dineen had ultimate control over the work forces on the T.T.C. job. Nor was it argued by union counsel that it did not have that control. Therefore, the proposition in *Crump* that a subcontractor has not discharged an employee without cause when the subcontractor has discharged the employee because the general contractor refuses to permit the employee to continue on the job could have application here. In the Board’s view, in all of the circumstances of the instant case, that proposition would have proper application here. In the result, the Board finds that Fox did have just cause to terminate Loughheed’s employment.

22. This decision should not be taken as saying that a subcontractor bound to a collective agreement which provides that there be just cause for discipline or discharge can shield itself from liability under the agreement in every instance where it is established factually that an employee has been discharged because a general contractor refuses to allow him work access to the site. While a subcontractor might not be able to employ any person on a site to whom the general contractor will not allow access, other circumstances, such as failure of the subcontractor to make any inquiries at all as to the general contractor’s reasons, or making no effort to persuade the general contractor to reconsider its position where the subcontractor has reason to believe that there is no foundation in fact for the general contractor’s actions, might cause the arbitrator to find that the subcontractor did not have just cause for discharge. These circumstances are not present in the instant case.

23. For all of the above reasons, this application is dismissed.

0191-89-R National Automobile, Aerospace and Agricultural Implement Worker's Union of Canada (C.A.W. Canada), Applicant v. Flo-Con Canada Inc., Respondent v. Group of Employees, Objectors

Certification - Membership Evidence - Union withdrawing certification application following non-pay allegation made by employer - Union re-filing with fresh membership evidence - Employer arguing that membership evidence remained under a "cloud" and should be rejected by the Board - Board not exercising its discretion to either dismiss application or order a vote -Certificate issuing

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *D. Patterson* and *G. O. Shamanski*.

APPEARANCES: *Clare Meneghini* and *T. Heller* for the applicant; *W. J. Hayter* and *Karen Beisch* for the respondent; *J. Sebetovsky* for the Employee objectors.

DECISION OF THE BOARD; July 17, 1989

1. In a decision dated July 6, 1989, the Board directed that a certificate issue forthwith to the applicant. We now provide our reasons.
2. This application for certification is the second application filed by the applicant with respect to the same employees of the respondent employer. The first application was filed on March 6, 1989. The employer filed a reply on March 23, 1989, alleging circumstances of non-pay with respect to one membership card collected by Ron Gorman, and numerous charges of intimidation, coercion, and misrepresentation with respect to the collection of the membership cards. The applicant union withdrew that first application on March 30, 1989, and filed the instant certification application on April 18, 1989, together with fresh membership evidence.
3. The respondent filed a reply in this application relying upon the charges asserted in the first application with respect to intimidation, coercion, and misrepresentation in the collection of the membership evidence and alleging additional impropriety of the applicant in the method of obtaining the membership cards. The respondent however filed no allegations of non-pay or non-sign with respect to any of the fresh cards, nor any allegations with respect to the Form 9 declaration before us. The Form 9 before us discloses no exceptions. The Form 9 declarant is the same person both in the instant application and the earlier certification application. The respondent submitted, in light of the withdrawal of the first application in the face of the allegations filed by the respondent, that the applicant union ought to be precluded from denying the truth of those allegations, and the Board must accept those allegations as factually correct.
4. The Form 9 declarant is a union organizer, and not an employee of the respondent. She testified earlier in this proceeding concerning a different matter (cf. the Board's decision of June 2, 1989), and in that testimony acknowledged that the first application was withdrawn because of the allegations filed by the employer. The applicant's counsel in submissions stated that upon investigation by the Form 9 declarant, she had discovered that Gorman had committed the non-pay error alleged by the employer, and accordingly she had withdrawn the first application. Gorman was not the collector of any of the fresh cards filed in this application, nor is there any evidence that he was involved in any aspect of the collection of these cards.
5. The Board indicated that it would not conduct its own Form 9 inquiry, as there were no allegations with respect to the instant Form 9 or membership cards, and the membership cards were newly collected. The Form 9 and cards appeared regular in all respects. The Board did not

accept the allegations of the respondent as factual, and it ruled that the union was not estopped or precluded from denying the allegations. The parties were directed to lead the evidence which they wished on any of the matters in issue.

6. Only the respondent led evidence. That evidence was quite limited. During the first organizing campaign employee organizers for the applicant approached fellow employees at work, during working hours, contrary to the stated wishes of the respondent employer. Two employees were given written warnings because of their solicitation during such working hours. Also during the first organizing campaign, Terry Belcher was a supervisor and was seen on numerous occasions speaking to three employees who were involved in the organizing campaign. There was no apparent work-related reason for Belcher to have been speaking to these individuals. When another supervisor or managerial individual approached this group, the group would dissipate. There was no evidence of what Belcher and the three employees discussed. Two of those three employees were the employees warned for organizing on work time. There is no evidence whether Belcher was ever warned or disciplined. An employee supervised by Belcher was concerned that Belcher might discriminate against her because of her opposition to the union. Finally, Ron Gorman kept a set of brass knuckles in his tool box, and those brass knuckles were seen in the top tray of his tool box by two different supervisors. There was no evidence that Gorman had ever used the brass knuckles, threatened to use them, or that any employee in the work place, other than managerial personnel, was aware that Gorman had these brass knuckles.

7. Based on this evidence, the respondent first argued that the fresh membership evidence remained under a cloud, given the non-pay and Form 9 problems in respect of the first application. The respondent submitted that the applicant had attempted a fraud upon the Board in the first application, and should not be allowed to escape the consequences of such behaviour by the artifice of withdrawing the first application and filing the instant application. This cloud or suspicion was such that the Board could not, as it ordinarily would, rely upon the membership cards and the Form 9. The Board therefore, submitted the respondent, ought to dismiss the instant application or at least direct a representation vote. Secondly, the respondent asserted that a series of acts or events with respect to the collection of the first membership cards was such that the Board ought to be seriously concerned about whether the documentary evidence before it in the instant application could be considered reliable. Particularly, the respondent pointed to: Belcher's unfair treatment of an employee she supervised because of that employee's known opposition to the union and Belcher's obvious support for the union, Belcher's speaking to employee organizers during working hours, the union conducted its campaign during company time on the company premises, Gorman intimidated employees with the use of brass knuckles, employees were repeatedly pressured into signing by union organizers, the fact of the non-pay with respect to the first application, the circumstances of and the reason for the withdrawal of the first application, and the uncontested fact that the union engaged in door-to-door soliciting at the employees' residences with respect to the collection of the fresh membership cards. In support of these submissions, counsel for the respondent relied upon the following decisions: *Mathias Ouellette* [1955] C.L.L.R. ¶16,026, *Hydro Electric Commission of Hamilton* [1958] CCH ¶18,120, *Canadian Wire Brush Company* [1976] OLRB Rep. Dec. 800, *The Ontario Hospital Association* [1979] OLRB Rep. March 243, *St. Michael Shops of Canada Limited* [1979] OLRB Rep. April 346, *Leco Industries Limited* [1979] OLRB Rep. May 404, *The Bristol Place Hotel* [1979] OLRB Rep. June 486, and *Bennett Paving & Materials Limited* [1980] OLRB Rep. Nov. 1579.

8. We turn first to the allegations of misconduct of the applicant with respect to the collection of the membership cards filed in the instant application. Notwithstanding the numerous allegations of the employer, there was no evidence which would suggest that there was anything improper in the collection of any of the cards filed in support of this application. Membership cards

do not become unreliable merely because a union obtains them by approaching employees at their residences or because a union obtains them at the place of employment. They do not become unreliable because a supervisor is seen at work talking to employees who are involved in the organizing campaign. Nor do they become unreliable because some previously signed cards, not relied upon by the union, were collected by an employee who owns brass knuckles and keeps them in his tool box, where others at work happen to see them. We find there has been no misconduct by the applicant nor other events that would cast any doubt on the reliability of the memberships.

9. Secondly, the respondent alleged that the applicant union committed a fraud upon the Board with respect to the first application, and ought not to be allowed to benefit from such fraudulent behaviour by the mechanism of withdrawing the first application. No bar was imposed upon any subsequent application at the time the first application was withdrawn. Nor do the facts suggest that the Board ought to have imposed a bar with respect to the first application. (See, for example, *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441, *Amarcord Carpenters Ltd.*, [1989] OLRB Rep. June 531. Consequent upon that withdrawal, the applicant filed a new certification application, together with entirely new membership evidence. None of these new cards involved the activities of Gorman, the person who had been responsible for the non-pay of a card in the first application. No allegations were filed with respect to any of this membership evidence nor with respect to the Form 9 declaration. This new membership evidence is satisfactory in all respects, and demonstrates support for the applicant in excess of fifty-five per cent of the employees in the bargaining unit.

10. The Board stated in *Leco Industries Limited*, *supra*:

9. The argument made by the respondents in the present case is virtually identical to that considered, and rejected, by the Board in the very recent decision in the *Ontario Hospital Association* (Board File No. 1772-78-R), decision dated March 14th, 1979 - as yet unreported. There, too, the respondent argued that, because of certain allegations which had been made in a previous application, the Board should exercise its discretion to order a representation vote in a subsequent application. At paragraphs 9 and 10 of the *Ontario Hospital Association* decision the Board summarized the argument as follows:

9. The respondent argued that the Board relies upon Form 8[now Form 9], Declaration concerning Membership Documents, and the evidence of membership filed by the applicant. The respondent stressed that Form 8 is to be completed on the basis of knowledge (including inquiries), information and belief and argued that Form 8 had been signed negligently and erroneously. On this basis the Form 8 filed in File No. 0718-78-R was characterized as inaccurate, false and misleading. In these circumstances, the respondent argued that there is a cloud on the evidence in the instant application (even if new evidence of membership has been filed) which may only be dissipated by a representation vote in the instant application.

10. The central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in one application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which involved the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

10. In view of this very recent Board decision, which contains a review of the authorities, it is unnecessary for the Board to repeat that review in the present case. Suffice to say that the Board adopts the reasoning and analysis of the panel in the *Ontario Hospital Association* case, as well as its conclusion that no representation vote should be ordered in these circumstances. Whether or not the Board can resort to evidence given before it at previous certification hearings when the panel was differently constituted (in this regard see *R. v. OLRB, ex parte Trenton Construction Workers Assoc.*, [1963] 2 O.R. 376 and, more recently, *Radio Shack* [1978] OLRB Rep. Nov. 1043) we are not persuaded that the allegations in the present application are of such kind or character as to prompt the exercise of our discretion to impose a bar or order a repre-

sentation vote. There is no allegation before the Board in the present case with respect to any impropriety in the evidence presently before us. Nor, as we have already pointed out, is there any evidence of irregularity or misconduct in the previous application. In the circumstances, therefore, the Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 9th April, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. In *Duracon Precast Industries Ltd.*, [1981] OLRB Rep. Jan. 22, the Board wrote:

9. As the Board pointed out in *The Ontario Hospital Association* case, [1979] OLRB Rep. March, p.243, in the circumstances of the instant application, the central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in an earlier application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which invokes the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

10. The applicant has disclosed to the Board the nature of the irregularity with respect to the evidence of membership in Board File No. 0997-80-R. The nature of the irregularity arose because of the conduct of an employee which subsequently became known to the applicant. There is nothing to indicate that the applicant attempted to mislead the Board. The respondent relied on decisions of the Board in the *Hydro Electric Commission of Hamilton* case, 58 CLLC ¶18,120, and in the *Echlin United of Canada Limited* case, [1965] OLRB Rep. May, p.91, in support of its proposition that a representation vote should be conducted by the Board. Those two cases involved attempts to mislead the Board and the Board directed a representation vote in each case. These two cases are distinguishable from the instant application in that there has not been a finding by the Board of any intention to mislead the Board. In addition, on the representations before it, the Board is not prepared to find that the applicant had any intention of misleading the Board in the earlier application for certification in Board File No. 0997-80-R.

11. The respondent has stated that there is a heavy onus on the applicant to satisfy the Board that the membership evidence is fresh and entirely without irregularity. The applicant has filed fresh evidence of membership in the instant application. The respondent has not suggested how the applicant would satisfy the requirement of being "entirely" without irregularity" having regard to the provisions of section 100 of the Act. The respondent has not alleged, and the Board's examination does not disclose, any irregularity in the evidence of membership filed by the applicant. The Board is not prepared to find in the circumstances of the instant application either that there has been an abuse of the Board's procedures by the applicant or that there is a taint in the evidence of membership in the instant application.

12. The applicant has filed a duly completed Form 8, Declaration Concerning Membership Documents. This declaration has been completed on the basis of fresh evidence of membership and there is no indication before the Board that the declarant either in the earlier application or in the instant application did not complete the declaration to the best of his knowledge, information and belief.

13. Having regard to the foregoing, the Board is satisfied that it is not necessary for the Board to seek the confirmatory evidence of a representation vote in this application. The Board notes that the applicant has withdrawn its request that the Board invoke its powers pursuant to section 7a of the Act.

12. And in *Barouh Eaton (Canada) Ltd.*, unreported, March 4, 1985, Board File #2883-84-R, the Board wrote:

6. Counsel for the respondent argued that the Board should order a representation vote in the circumstances of this case because the applicant had sought leave to withdraw an earlier application for certification in respect of this respondent during the course of the hearing in that proceeding in which testimony about certain improprieties in

the membership evidence filed in that case had been led. The Board in that case had dismissed the application for certification. There were allegations filed by the respondent about harassment of employees in both that earlier proceeding and in the instant matter. The application in the first proceeding had been dismissed before the allegations of harassment could be considered by the Board. Counsel for the respondent did not attempt to lead any evidence of harassment at the hearing in this matter, but had requested that the Board appoint a Labour Relations Officer to investigate those allegations, and, depending on the result of that investigation and report of the officer, schedule another hearing to deal with the allegations. The Board, following its usual practice, did not appoint an officer to conduct the requested investigation. The Board received detailed submissions from counsel for the respondent and from counsel for the applicant as to whether the Board should order a representation vote in these circumstances. The representatives of the group of objecting employees were given the opportunity to make submissions, but chose not to do so. After hearing the submissions, the Board recessed and then returned to issue the following oral ruling:

The Board is not satisfied that the circumstances existing in this case should cause the Board to depart from its normal practice of requiring a party making allegations of improper conduct to particularize those allegations and call evidence at the Board's hearing.

Since the membership evidence filed in support of this application is fresh membership evidence, we find that the principles discussed by the Board in the *Ontario Hospital Association* case, [1979] OLRB Rep. March 243 and the *Leco Industries Limited* case [1979] OLRB Rep. May 404 are applicable here, and that there is no cloud on that membership evidence.

Thus, we are not persuaded that we should order a representation vote in this matter.

13. We adopt the approach taken by the Board in these and numerous other decisions of the Board. The only irregularity or misconduct of which we either have evidence or a concession by the applicant is with respect to one card filed in support of the first application: the employee who had signed the card had not paid a dollar as the card suggested he or she did. This does not clearly point to any impropriety or attempted fraud on behalf of the union or the Form 9 declarant nor does it cast a cloud on the fresh membership evidence. We are not disposed to exercise our discretion and either dismiss this application or order a representation vote simply because one card in an earlier application involved a non-pay.

14. For these reasons the Board was satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 4, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. Accordingly, the Board issued its decision of July 6, 1989, indicating that the applicant was to be certified and directing that a formal certificate issue forthwith.

2678-88-R; 2857-88-R Labourers' International Union of North America, Local 506, Applicant v. **Gottcon Contractors Limited**, Gottardo Properties (Dome) Inc., Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Limited, Gottardo Holdings Company Ltd., Gottardo Management Limited, and Gottardo Corporation, Respondents; The Bricklayers, Masons Independent Union of Canada, Local 1, Applicant v. **Gottcon Contractors Limited**, Gottardo Properties (Dome) Inc., Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Limited, Gottardo Holdings Company Ltd., Gottardo Management Limited, and Gottardo Corporation, Respondents v. Labourers' International Union of North America, Local 506, Intervener

Certification - Construction Industry - Related Employer - Labourers Union seeking in its certification application to have the respondent companies declared one employer - Bricklayers Union intervening in certification and filing its own related employer application - Whether Board would exercise its discretion to declare respondents one employer - Board dismissing Bricklayers' application because union did not act promptly but making one employer declaration in the Labourers' application - Certification application scheduled for further hearing

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. Gibson* and *J. Redshaw*.

APPEARANCES: *E. M. Mitchell* and *E. D. Ferreira* for the applicant, Labourers; *Susan Ursel* and *John Meiorin* for the applicant, Bricklayers; *Carl Peterson* for the respondents; no one appearing for the intervener.

DECISION OF THE BOARD; July 18, 1989

1. As a result of our earlier ruling rendered on March 23, 1989, the Board heard these files together. The Board heard the evidence and representation of the parties in respect of certain issues which arise in these two applications on July 5th, 6th, and a portion of the day on July 10, 1989. Thereafter the Board adjourned the proceedings for the remainder of the day scheduled for hearing on July 10, 1989. When the hearing was reconvened on July 11, 1989 the Board rendered the following oral ruling:

We have before us two Board files. The first is Board File No. 2678-88-R which is an application for certification filed by the Labourers' International Union of North America, Local 506 (hereinafter referred to as Labourers, Local 506). The respondents to that application are; **Gottcon Contractors Limited**, **Gottardo Properties (Dome) Inc.**, **Gottardo Properties Limited**, **Gottardo Contracting (1980) Inc.**, **Gottardo Contracting Co. Limited**, **Gottardo Holdings Company Ltd.**, **Gottardo Management Limited**, and **Gottardo Corporation**. In its application for certification, Labourers, Local 506 seek to rely upon section 1(4) and section 63 of the *Labour Relations Act* "with respect to the relationship between the respondents". At the hearing on March 23, 1989, counsel for the Labourers, Local 506 indicated that the Labourers, Local 506 was not pursuing its application pursuant to section 63 of the Act.

The Bricklayers, Masons Independent Union of Canada, Local 1 (hereinafter referred to as Bricklayers, Local 1) have filed an intervention in the Lab-

ourers, Local 506 certification application. Bricklayers, Local 1 asserts that it represents employees and is the bargaining agent of employees who may be affected by the application. The intervener asserts that the collective agreement between the Masonry Contractors Association of Toronto Inc. and Bricklayers, Local 1 covers employees in the bargaining unit sought by the Labourers, Local 506 in its application for certification and therefore that collective agreement bars or renders as untimely the application for certification.

In addition we have before us Board File No. 2857-88-R which is an application pursuant to section 1(4) and section 63 of the Act in which the applicant, Bricklayers, Local 1 seeks a declaration that the same group of eight companies which are respondents in Board File No. 2678-88-R are related employers within the meaning of section 1(4) of the Act, or alternatively that "a sale of a business within the meaning of the Act has taken place as between the respondents."

At the hearing on March 23, 1989, counsel for the Bricklayers, Local 1 indicated that the Bricklayers, Local 1 was not pursuing its application pursuant to section 63.

Labourers, Local 506 has filed an intervention in the Bricklayers, Local 1 application in which Labourers, Local 506 assert, in effect, that the Bricklayers, Local 1 application be dismissed because Bricklayers, Local 1 has "unreasonably delayed" in bringing this application and "knew or ought to have known of the existence of and the relationship between the respondents." In addition Labourers, Local 506 assert Bricklayers, Local 1 is attempting to extend and not merely preserve its bargaining rights.

Having regard to the submissions of counsel for the Bricklayers, Local 1 and the Labourers, Local 506, and the evidence before this Board, we hereby dismiss the applicants' application pursuant to section 63 of the Act in both Board File No. 2678-88-R and Board File No. 2857-88-R.

At the commencement of these proceedings the Board heard the submissions of the parties in respect of the appropriate order of proceeding with these two files. The Bricklayers, Local 1 had requested that these applications be consolidated. On March 23, 1989, after considering the submissions of the parties, the Board filed as follows:

Having considered all the submissions the Board has determined that it will have to hear the evidence and representations of the parties in respect of the section 1(4) applications first. We propose to hear all of that evidence and those representations together without deciding which of the two section 1(4) we are dealing with first. In our view the employees affected by these two section 1(4) applications are the same employees. Any section 1(4) declaration granted would be effective, at the latest, as of January 27, 1989 the date upon which the Labourers, Local 506 applied for certification. In light of these factors we are of the view that it is more expeditious and sensible to hear all of the evidence at once. At this time we wish to alert the parties that their evidence and submissions should

address whether all eight companies or perhaps some lesser number of those eight companies should be joined as this is a possible result.

We therefore proceeded to hear the evidence and representations of the parties in respect of the two section 1(4) applications first. Thereafter, and depending on the disposition of the two section 1(4) applications the Board would turn to any other outstanding matters in the application for certification filed by the Labourers, Local 506 including the description and composition of the bargaining unit, and the effect, if any, of the collective agreement between the Masonry Contractors Association of Toronto and Bricklayers, Local 1.

The evidence and submissions of the parties in respect of the issues raised in the two section 1(4) applications was heard by the Board on July 5th, 6th and 10th. During the course of their submissions the parties also touched upon matters relating to the appropriate description of the bargaining unit sought by the Labourers, Local 506 in its application for certification and argued that those matters affected the Board's discretionary powers in dealing with the section 1(4) applications.

Although the appropriateness of the bargaining unit description has been considered by this panel, we have done so only in the context of our discretionary powers under section 1(4) and whether or not a common employer declaration ought to be made in either or both of these applications pursuant to section 1(4). Our decision today therefore does not purport to deal with either the description or composition of the bargaining unit or the effect if any of the Bricklayers, Local 1 collective agreement with the Masonry Contractors Association of Toronto.

During the course of these hearings, the Board also heard evidence in respect of certain companies which form part of what has been referred to as the "Gottardo Group of Companies" although these companies were not listed as respondents in either section 1(4) application. More specifically, the evidence indicates that Renato Gottardo properties is a sole proprietorship and acts as a landlord for property personally owned by R. Gottardo. Gottardo Properties (Dome) Inc., a named respondent, is a holding company which holds the lease on a SkyDome box. In addition, the evidence discloses that Gottardo Properties is a partnership of Gottardo Properties Limited and Gottardo Corporation. Both Gottardo Properties Limited and Gottardo Corporation are named respondents although Gottardo Properties itself is not a respondent to these proceedings. Gottardo Properties however, acts as an owner/developer and does not employ anyone directly in the construction industry. The parties agreed that this fact should be noted in this decision.

The parties agree, and having regard to that agreement and the evidence before us the Board finds, that the three pre-conditions to the granting to a section 1(4) declaration have been met in respect of the following named respondents; Gottcon Contractors Limited, Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Limited, Gottardo Holdings Company Ltd., Gottardo Management Limited, and Gottardo Corporation. Those various entities carry on associated or related

activities or businesses and are under common direction or control. The issue therefore is whether the Board ought to exercise its discretion in favour of the applicants and make a common employer declaration in either or both of these section 1(4) applications.

The parties have agreed that any section 1(4) declaration made in either of these applications would not encompass the remaining named respondent namely Gottardo Properties (Dome) Inc. as that company is not now and does not intend to be an employer in, or carry-on business in, the construction industry.

Having found that the pre-conditions to a section 1(4) declaration have been met in respect of these seven respondents we now turn to address whether or not the Board ought to exercise its discretion in either or both of these applications, and if so, the manner in which that discretion ought to be exercised. In making its determination in respect of that issue the Board made and considered the following findings of fact.

Gottardo Contracting (1980) Inc. and its predecessor companies is and was primarily a masonry contractor. Gottardo Contracting (1980) Inc. was incorporated on November 18, 1980. Gottardo Contracting (1980) Inc. (hereinafter referred to as Gottardo (1980)) is the successor to Gottardo Contracting Co. Limited. Gottardo Contracting Co. Limited was a member of the Masonry Contractors Association of Toronto from 1961 until 1980 when Gottardo (1980) took over. Gottardo (1980) is bound to the collective agreements between the Masonry Contractors Association and the Bricklayers Independent Union, Local 1 covering journeymen and assistants (hereinafter referred to as the Bricklayers, Local 1 collective agreements).

Renato Gottardo started as a masonry contractor in the early 1950's. Renato Gottardo ran the business through Gottardo Contracting Co. Limited until his son, Aldo Gottardo, joined the business in 1978. Since 1978, Renato Gottardo and Aldo Gottardo have jointly run Gottardo Contracting Co. Limited and then the group of companies when they were established in the 1980's.

Beginning in 1978 Gottardo Contracting Co. Limited started to act as a general contractor in addition to performing masonry work. In addition to acting as a general contractor, the company would also perform excavation and concrete forming work. In 1980 Gottardo (1980) continued the same work previously performed by Gottardo Contracting Co. Limited. Gottardo Contracting Co. Limited became dormant and remains a shell.

From 1980 until 1985, Gottardo (1980) continued acting as a general contractor and masonry contractor. In addition, Gottardo (1980) would perform excavation and concrete forming foundation work.

In performing this work, Gottardo (1980) used journeymen bricklayers, bricklayers' assistants and general labourers. When help was required on the excavation work the company would use both bricklayers' assistants and general labourers to assist with the excavation, the building of the concrete forms and the back filling of the trenches. Conversely, when the bricklayers'

assistants required help, the company would assign general labourers to perform bricklayers' assistants' work on the masonry portion of the job.

Beginning in 1980, Gottcon Contractors Limited (hereinafter referred to as "Gottcon") began to bid on jobs as a general contractor. From 1980 until 1985, Gottcon did not employ anyone directly and would subcontract out all the work. Gottcon sub-contracted approximately 90% of the masonry and general labouring work to Gottardo (1980) from 1980 to 1985.

In 1985, Gottardo (1980) transferred its general labourers to Gottcon. Beginning in 1985, Gottardo (1980) had ceased to act as a general contractor.

Prior to this transfer of general labourers to Gottcon, and while employed by Gottardo Contractors (1980) Inc., the Bricklayers, Local 1 collective agreements were applied to those persons subsequently transferred to Gottcon. While employed by Gottardo Contracting (1980) Inc. these persons were paid in accordance with the rates of pay established in the Bricklayers, Local 1 collective agreements and dues and health & welfare benefits were deducted and subsequently remitted to the union on their behalf. After the transfer of the general labourers to the Gottcon payroll, the Bricklayers, Local 1 collective agreements were no longer applied to those general labourers then employed by Gottcon in-so-far as, for example, they were not paid in accordance with the rates of pay set out in the Bricklayers, Local 1 collective agreement and neither dues nor health & welfare benefit deductions were made or remitted to the Bricklayers, Local 1 union on their behalf.

Gottcon, as a general contractor, continued to sub-contract out approximately 90% of the masonry work to Gottardo (1980). When Gottcon and Gottardo (1980) were on the same construction site the companies continued its previous practice of assisting each other with their respective crews. For example, general labourers employed by Gottcon would help bricklayers' assistants working for Gottardo (1980) when needed while bricklayers' assistants working for Gottardo (1980) would help the general labourers working for Gottcon in the excavation of the site, the construction of the concrete forms and the back filling of the trenches. The companies followed this practice on a daily basis when both Gottcon and Gottardo (1980) were on the same site. Given the fact that Gottardo (1980) derives most of its masonry work from Gottcon, the two companies are on the same site almost all the time.

After 1985, Gottardo (1980) continued to bid for both masonry and excavation work. If Gottardo (1980) was successful in tendering for both masonry and excavation work, Gottardo (1980) would perform the masonry work and Gottcon would perform the excavation and form work with its general labourers. When the bricklayers' assistants performed general labourers' work, they are under the supervision of the Gottcon Superintendent. When the general labourers of Gottcon are helping the bricklayers' assistants of Gottardo (1980), they are under the supervision of the Gottardo (1980) Superintendent.

Mr. John Meiorin, who has been the secretary/treasurer of Bricklayers,

Local 1 since 1962 testified that he was aware that Renato Gottardo, one of the principals of these various respondents, had several companies including a company which acted as a general contractor in the construction industry. Mr. Meiorin testified however, that he and the union were unaware, until the Labourers, Local 506's application, that any of these other companies (and in particular Gottcon) employed any persons or that those persons were performing work which the Bricklayers, Local 1 assert falls within the scope of their collective agreement. Mr. Meiorin further testified about a telephone conversation which he had with Mr. Renato Gottardo approximately five to six years ago during which Mr. Gottardo indicated that some of his employees were being employed as general labourers rather than bricklayers or bricklayers' assistants, but also indicated that those persons would continue to be members of the union, would continue to be paid in accordance with the terms of the collective agreements, and dues and remittances on their behalf would continue to be sent to the union. From this telephone conversation Mr. Meiorin understood that Gottardo Contracting (1980) Inc. was performing some general labouring work using bricklayers' assistants who continued to be members of Bricklayers, Local 1.

From the totality of the evidence we find that since 1985 Gottardo Contracting (1980) Inc. has employed and continues to employ "bricklayers" and "bricklayers' assistants". Persons employed by Gottardo Contracting (1980) Inc. in these classifications are covered by the Bricklayers, Local 1 collective agreement. Since 1985 Gottardo has not employed directly any persons classified as "general labourers". Gottcon employs the "general labourers" and the Bricklayers, Local 1 collective agreement has not been applied to those persons. The bricklayers, bricklayers' assistants and general labourers of these two companies work side by side, as an integrated work force and are often used interchangeably to perform the work required. Where Gottcon's general labourers are used to assist the Gottardo Contracting (1980) Inc. bricklayers and/or bricklayers' assistants however, they continued to be paid by Gottcon in accordance with the individual rate of pay. Similarly, when Gottardo Contracting (1980) Inc. bricklayers' assistants are used to perform general labourer work they continued to be paid in accordance with the terms of the Bricklayers, Local 1 collective agreement, and dues and other deductions continue to be made and remitted on their behalf. In those cases, where the employees of these companies are interchanged, an internal accounting procedure is used to invoice the one company for the services provided by the employees of the other company i.e. Gottcon invoices Gottardo Contracting (1980) Inc., and Gottardo Contracting (1980) Inc. pays Gottcon for labour provided when Gottardo (1980) uses Gottcon general labourers while the reverse is also true.

Without in any meaning to minimize the able and thorough arguments of counsel in respect of our discretion, all of which have been considered by the Board, we briefly summarize their positions as follows.

Counsel for the Bricklayers, Local 1 argued that the Bricklayers, Local 1 application ought to be determined first primarily because of Bricklayers, Local 1 existing bargaining rights. Counsel argued that in its application (Board File No. 2857-88-R) a common employer declaration ought to be

made in order to preserve the bargaining rights of Bricklayers, Local 1. Counsel submitted that the facts disclosed that the bargaining rights of the applicant have been eroded as the work of the bricklayers' assistants covered by the Bricklayers, Local 1 collective agreement has been transferred to, and is performed by the non-union general labourers employed by Gottcon. Counsel argued that as soon as Bricklayers, Local 1 became aware of this situation (after the filing of the Labourers, Local 506 certification application) it promptly filed its section 1(4) application. Counsel argued that the Bricklayers, Local 1 had met the "due diligence" test enunciated in the *Great Atlantic & Pacific Company of Canada Limited*, [1981] OLRB Rep. March 285, and had not slept on its rights. Counsel submitted that the Bricklayers, Local 1 did not, and could not have asserted its bargaining rights as against the various corporate entities prior to the filing of its section 1(4) application because the union was unaware, and in view of Mr. Meiorin's telephone conversation with Mr. Gottardo and the assurances he received during that conversation, Local 1 need not have taken any further steps to become aware, that these other entities, (and in particular Gottcon), employed persons who were being used to perform work covered by the Bricklayers, Local 1 collective agreement.

In respect of the Labourers, Local 506 application for a section 1(4) declaration, it was asserted that the Bricklayers, Local 1 collective agreement was a bar to the Labourers, Local 506 application for certification, would disrupt the existing bargaining rights of Bricklayers, Local 1 and would lead to numerous future jurisdictional disputes and would unduly fragment a natural and appropriate bargaining unit. It was ultimately submitted that for those reasons the Labourers, Local 506 application pursuant to section 1(4) and its application for certification should be dismissed.

Counsel for the Labourers, Local 506 argued that its application pursuant to section 1(4) should be granted while the application of the Bricklayers, Local 1 should be dismissed, both because of the delay of the union in asserting its rights, and because the Bricklayers, Local 1 application was an attempt to extend and not merely preserve bargaining rights.

Counsel for the Labourers, Local 506 argued that in the circumstances of this case, (and after consideration of the description of the bargaining unit for which the Labourers, Local 506 have applied - a unit which would specifically exclude employees in any bargaining unit for which any trade union held bargaining rights as of the date of the Labourers' application) the granting of a section 1(4) declaration would *not* interfere with the existing bargaining rights of the Bricklayers, Local 1 although such a declaration *would* reflect the true wishes of the employees. It was submitted that to deny the Labourers, Local 506 application for certification and its request for a common employer declaration would deprive the employees employed as general labourers, persons to whom the Bricklayers, Local 1 collective agreement has not been applied in at least the past four years, of the right to be represented by the trade union of their choice. It was submitted that the Bricklayers, Local 1 collective agreement did not apply to general labourers but only to bricklayers' assistants. Alternatively, it was argued that if that collective agreement did apply to general labourers, the Bricklayers, Local 1

had abandoned its bargaining rights in respect of these general labourers because of its failure to represent those persons in the past four years.

Counsel for the respondent made several submissions respecting the description of the bargaining unit asserting that the issues in respect of that matter were interwoven and directly related to the issues in respect of our discretion pursuant to section 1(4). We intend to address those issues more fully when we get to that stage of the proceedings where we deal with the bargaining unit and the effect, if any, of the Bricklayers, Local 1 collective agreements.

Counsel argued that the Labourers, local 506 could not, in an application made pursuant to section 144(1) of the Act, an application which relates to the ICI sector of the construction industry, apply for a bargaining unit which excludes certain persons who fall clearly in the Ministry's designation order made under section 139 which relates to Labourers, Local 506 (in this case bricklayer's assistants or brick tenders). He argued that the bargaining unit applied for in this application was an attempt by Labourers, Local 506 to "carve out" part of its trade and that such was not permitted under the scheme of province-wide bargaining contained in the Act. It was submitted that as the Labourers, Local 506 could *only* apply for its "standard" unit, encompassing *all* employees referred to in its designation, the granting of a section 1(4) application to the Labourers (and the subsequent certification application) would disturb the existing bargaining rights of the Bricklayers, Local 1 and would bring these two unions into direct conflict creating numerous jurisdictional disputes, various grievances including subcontracting violation grievances, and would make no labour relations sense given the integrated nature of the respondents' work forces and the Bricklayers, Local 1 existing bargaining rights. Counsel did not make any submissions regarding the issue of delay with respect to the Bricklayers, Local 1 section 1(4) application. Instead he asserted that either both applicants should be successful (at which point we would inevitably have to conclude that the Labourers, Local 506 application was untimely and barred by the Bricklayers, Local 1 collective agreement if we found that collective agreement to apply to persons described for present purposes as "general labourers"), or neither should be successful. Indeed, counsel argued that, as the Bricklayers, Local 1 had intervened in the Labourers, Local 506 application, and was therefore a participant in that proceeding, the Board could not in that application (Board File No. 2678-88-R) grant a section 1(4) declaration to the Labourers, Local 506 without granting one to Bricklayers, Local 1. It was submitted that the Board had no jurisdiction to make a declaration which was limited to one trade union (i.e. Labourers, Local 506) and not encompass the other trade union in the circumstances of this case.

This is but a brief synopsis of the extensive submissions of the parties. The Board has very carefully considered those submissions, especially the various submissions which turn upon matters relating to public policy and the sound labour relations considerations which guide the Board in the exercise of our discretion. Having regard to the evidence before us and the submissions of the parties we hereby dismiss the application brought by Bricklayers, Local 1 in Board File No. 2857-88-R. In our view, Bricklayers, Local 1 has not acted

promptly or with due diligence to protect the bargaining rights it now asserts it has.

The Bricklayers, Local 1 was aware of the existence of Gottcon. Moreover, Mr. Meiorin was expressly alerted to the fact that certain employees were now doing primarily general labourers' work. Notwithstanding the assurances of Mr. Gottardo, under the circumstances of this case the union should have investigated and/or monitored the various activities of these corporate entities. Prior to the filing of this application, the union has not taken any active steps to assert its collective agreement in respect of the general labourers employed at Gottcon. Nor did the union take any steps to acquire the bargaining rights in respect of employees employed by any of the respondents other than Gottardo Contracting (1980) Inc. either by way of a certification application, voluntary recognition or a timely section 1(4) application. This notwithstanding the fact that the respondents have carried out their activities in an open and public manner by displaying construction signs bearing the names of both Gottcon and Gottardo at its construction projects, by driving vehicles which bear the names of one or the other company, and most importantly by routinely and regularly using union and non-union employees side by side and interchangeably on the same construction projects.

If this were a "stand alone" application brought in the absence of the Labourers, Local 506 application, the Board would normally dismiss an application brought four years after the circumstances which first gave rise to the application came into existence. In those circumstances, as in the present, the Board finds that the union knew, or should have known, of the circumstances and should have acted within a reasonable period of time to protect or assert its bargaining rights. Four years is not such a reasonable period of time.

In our view the fact of the Labourers, Local 506 application does not affect such an analysis. To hold otherwise would enable the Bricklayers, Local 1 to establish a collective agreement bar in respect of bargaining rights which have not been asserted and/or which have been left exposed since 1985. For these reasons Board File No. 2857-88-R is dismissed.

In respect of Board File No. 2678-88-R the Board does not accept counsel's submissions that it is without jurisdiction to make a section 1(4) declaration in respect of one party such as the applicant while at the same time refusing to make the declaration in respect of another party such as the intervener. The facts and circumstances and the policy considerations which the Board considers in the exercise of its discretion in respect of one party may be absent or may be outweighed by facts or circumstances or policy considerations as applied to another party. In our view such is the present case.

Although the Board has dismissed the Bricklayers, Local 1 application for reasons of delay, no such factor is present when we turn to the Labourers, Local 506 application. In our view, the Labourers, Local 506 application pursuant to section 1(4) should succeed.

Once again we note that if the Labourers, Local 506 application was a

“stand-alone” application brought in the absence of the Bricklayers, Local 1 existing bargaining rights or concurrent section 1(4) application, the Board would grant a section 1(4) application in order to create a viable bargaining unit within this integrated work force, prevent the undue fragmentation of employees, and prevent the possible erosion of bargaining rights. Although the presence of the Bricklayers, Local 1 existing bargaining rights was a factor considered by the Board in determining whether to exercise our discretion, in the circumstances of this case we are of the view that those existing bargaining rights can and are more appropriately dealt with when we turn to the other issues raised by the Labourers, Local 506 application for certification.

In the result therefore, we declare that for purposes of the *Labour Relations Act*, and only in respect of its relations with Labourers, Local 506 and each of the affiliated bargaining agents of the designated employee bargaining agency, namely the Labourers’ International Union of North America and the Labourers’ International Union of North America, Ontario Provincial District Council, Gottcon Contractors Limited, Gottardo Properties Limited, Gottardo Contracting (1980) Inc. Gottardo Contracting Co. Limited, Gottardo Holdings Company Ltd., Gottardo Management Limited, and Gottardo Corporation constitute one common employer.

2. After rendering this oral ruling the Board continued to deal with a number of issues arising out of the application for certification filed by the Labourers’ International Union of North America, Local 506. The hearing was not concluded on July 11, 1989 and as result the Board set the following days for a continuation of this hearing; September 21, 1989, November 1, 2 and 9, 1989. At the continuation of the hearing the Board will hear the evidence and representations of the parties in respect of any and all matters arising out of the application for certification filed by Labourers’ International Union of North America, Local 506 including the status of the intervener, the description and composition of the bargaining unit, and the effect if any of the collective agreement between the Masonry Contractors Association of Toronto and The Bricklayers, Masons Independent Union of Canada, Local 1.

1237-88-R; 1352-88-U Labourers’ International Union of North America, Local 506, Applicant/Complainant v. **Grant Construction**, Division of Malachy Grant and Associates Limited, Respondent

Bargaining Unit - Certification - Construction Industry - Membership Evidence - Practice and Procedure - Respondent making one non-pay allegation - Respondent suggesting the Board’s investigation of the membership evidence ought to have extended beyond the respondent’s specific allegation - Board does not conduct an investigation unless the membership is irregular on its face or it receives specific particularized allegations of impropriety - Respondent not permitted to inspect membership evidence - Board satisfied with sufficiency of membership evidence and Form 80 declaration - Board rejecting argument that persons other than construction labourers should be included in labourers unit on community of interest grounds

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *Elizabeth Mitchell* and *Ed Ferreira* for the applicant/complainant; *Peter Chauvin* and *Robert Scott* for the respondent.

DECISION OF THE BOARD; July 14, 1989

1. By decision dated November 8, 1988, the Board (differently constituted in part) made certain findings, including the unit of employees of the respondent appropriate for collective bargaining, with respect to the application for certification herein. In addition, the Board authorized a Labour Relations Officer to inquire into and report to the Board with respect to the list of employees in the bargaining unit and particularly the challenges made by the applicant in that respect. The Board also indicated it would conduct its usual investigation into a “non-pay” allegation made by the respondent.

2. By decision dated December 13, 1988, the Board (again differently constituted in part) directed that a hearing be held with respect to the non-pay allegation.

3. At the outset of the hearing convened with respect to the respondent’s non-pay allegation, counsel for the respondent asked what investigation the Board had conducted in that respect and what inquiry the Board intended to pursue at the hearing. Counsel suggested that, in the circumstances, the Board’s investigation ought to have extended beyond the respondent’s specific allegations in that respect.

4. By letter, from counsel, dated November 3, 1988, the respondent alleged that one specific employee, Craig Pugsley, “did not pay to the Trade Union on his own behalf an amount of at least \$1.00 in respect of initiation fees or membership dues of the Trade Union” and requested that the Board investigate its allegation “in accordance with the Board’s usual practice in such matters”. By letter dated November 16, 1988, the respondent further particularized its non-pay allegations as follows:

We are in receipt of the Board’s decision dated November 4, 1988 in which the Board appointed a Labour Relations Officer to enquire into and report to the Board with respect to the list of employees in the Bargaining Unit and to conduct an investigation into the non-pay allegation made by the Respondent.

Further to our letter dated November 3, 1988, the Respondent has become aware that Mr. Craig Pugsley did not pay to the Trade Union on his own behalf an amount of at least \$1.00 in respect of initiation fees. Rather, the Respondent is advised that another employee paid the \$1.00 on Mr. Pugsley’s behalf and that no subsequent requests were made of Mr. Pugsley for the repayment of this amount by either the employee or Union representatives. We are advised that Mr. Pugsley has not in fact repaid this amount. We are not aware whether similar circumstances exist with regard to other employees.

We hope that these further particulars will assist the Board in conducting its investigation into this non-pay allegation and in verifying the declarations contained in the Union’s Form 9.

5. In *Estonian Relief Committee in Canada*, [1988] OLRB Rep. Nov. 1167 (at paras 16 and 17) the Board outlined what its “usual investigation” with respect to non-pay (and non-sign) allegations consists of as follows:

16. The first step in that “usual investigation” is to see whether any membership evidence has been submitted in the name of the employee who it is alleged did not sign a card or make the payment referred to on the receipt or other documentary evidence of payment accompanying

the card. The concern raised by a "non-sign" or "non-pay" allegation is that the Board has been invited to act on documentary evidence which may not reflect the truth about whether the person said to be a member has actually applied for membership or paid to the union on his own behalf the amount shown. If there is no document, there is no such concern. If there is a document purporting to be evidence of membership of the subject employee, a labour relations officer will interview that employee in private. If the interview discloses any matter which is cause for concern, either standing alone or in light of the contents of the Form 9 declaration filed by the union, the Board will schedule the matter for hearing, summon those persons who may have knowledge for the matters in issue and, at the hearing, conduct its own inquiry. If a "non-pay" or "non-sign" allegation does not result in the Board's scheduling a hearing, that is either because no membership evidence was filed with respect to the employee identified in the allegation or because the results of an interview with that employee raised no cause for concern. When it follows the "usual investigation", a decision not to conduct an enquiry at hearing with respect to a "non-sign" or "non-pay" allegation reveals nothing about whether a card was or was not received with respect to the individual named in the allegation.

17. Having regard to subsection 111(1) of the Act, the Board is concerned that its process not reveal whether a card has or has not been signed by an employee or filed with respect to that employee unless it is persuaded that there is some genuine cause for concern which outweighs the concern addressed by subsection 111(1). The risk of unnecessarily revealing membership information is minimized by invariably responding to a "non-pay"/"non-sign" allegation the subject of a hearing unless the result of the investigation warrants one. If it were otherwise, employees could be made to testify about whether they had or had not taken steps to join a union merely because they had been named in a non-sign or non-pay allegation pursued by those opposed to certification of "scatter gun" allegations of "non-pay" or "non-sign" could essentially neutralize the protection afforded by subsection 111(1).

(See also Sack, Jeffrey, Q.C. and C. Michael Mitchell, *Ontario Labour Relations Board Law and Practice* (Butterworths, Toronto, 1985) at pp. 181-182.)

6. In addition, section 72 of the Board's Rules of Procedure requires that any party wishing to rely upon what it asserts is irregular or improper conduct of another party to give notice and full particulars of its allegations in that respect (see *Estonian Relief Committee in Canada, supra*; *Pebrá Peterborough Inc.*, [1987] OLRB Rep. March 421, among others).

7. It should be evident that the Board does not conduct any audit, investigation or hearing with respect to membership evidence filed in support of an application for certification unless it appears to be irregular on its face or the Board receives specific particularized allegations of impropriety with respect to it. It should also be evident from the November 13, 1988 decision herein that the Board followed its usual procedure in such matters in this case. In the Board's view, there was no cogent reason to conduct any broader or other investigation or inquiry.

8. Subsequently, in the course of the testimony of Ed Ferreira (who is a Business Agent of the applicant, and who was both the collector of the membership evidence in question and the Form 80 declarant with respect to all of the applicant's membership evidence) the Board heard evidence with respect to the dates on which 4 membership documents other than the one in issue were collected by him. The respondent sought leave to examine these 4 cards on the basis that it could not properly evaluate Mr. Ferreira's testimony or cross-examine him without doing so.

9. Other than at a hearing which the Board finds it appropriate to hold with respect to non-sign or non-pay allegations, no party other than the applicant trade union is permitted to either examine witnesses with respect to or inspect membership evidence filed in support of an application for certification. Even at such a hearing the Board generally permits other parties to examine only those pieces of membership evidence which are the subject of specific non-sign or non-pay allegations. The Board's practise in this respect is based on the provisions of section

111(1) of the *Labour Relations Act* and have proved to be reliable (see *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223).

10. The Board was not persuaded that there was any cogent reason in this case to depart from its general practice by permitting the respondent to inspect the 4 additional membership documents. (Parenthetically, we note that the protection of section 111(1) of the Act also extends to persons who sign a statement of desire or petition in opposition to an application for certification and that an argument analogous to that put forward by the respondent on this issue could also be made by counsel for a trade union; that is, that it is necessary to inspect a petition in order to properly test the voluntariness thereof.) In our view, the primacy of the secrecy of information with respect to any persons wishes relating to trade union membership or representation is such that it will generally prevail over the usually slight prejudice to other parties which may result from the non-disclosure of such information. Accordingly, the respondent's request was denied. The Board did, however, advise the respondent that Mr. Ferreira had collected the cards in question and the dates on them.

11. After hearing and considering the evidence and representations of the parties with respect to the non-pay issue, the Board ruled (orally, with reasons to follow) that it was satisfied that it could rely on both the membership evidence in question and the Form 80 declaration.

12. The membership evidence in question relates to Craig Pugsley who was, at all material times, an employee in the bargaining unit. It consists of a combination application for membership in the applicant and receipt card which indicates, on the face of the document, that Pugsley paid a \$1.00 initiation fee with respect to membership in the applicant. It also indicates on its face, that Craig Pugsley wished to join and freely authorized the applicant and its parent the Labourers' International Union of North America to represent him in employment matters.

13. There was no dispute that Pugsley signed the application for membership card in question. Nor was there any dispute that the trade union received a \$1.00 payment with respect to that card from him. However, the respondent asserted that the circumstances were such that Pugsley did not in fact pay the \$1.00 on his own behalf and that the card is therefore defective. The respondent also submitted that Ferreira's actions and inquiries with respect to that matter were insufficient and that the Form 80 Declaration is therefore unreliable and should, together with all of the membership evidence to which it relates, be rejected by the Board.

14. Craig Pugsley testified that he signed the membership cards only because he felt harassed by the applicant. He also testified that he told the applicant's representatives that he did not have a dollar and that when another bargaining unit employee, Denies MacFarlane, offered to lend him the requisite dollar, he took it and gave it to Ferreira only to get rid of the applicant's representatives. He testified that he never had any intention of paying back the \$1.00 he obtained from MacFarlane.

15. On the other hand, Craig Pugsley, who did not strike the Board as being a particularly diffident individual, testified that he met the applicant's organizers (Ferreira and Michael Mihajlovic) on only two occasions, both on August 23, 1988, the day he signed the application for membership card. There was nothing in Craig Pugsley's testimony or in any other evidence before the Board which suggested he had in fact been harassed. Indeed, when Pugsley advised the organizers that he wanted an opportunity to speak to a friend of his about joining a trade union and asked them to come back that afternoon, they did so.

16. Craig Pugsley also testified that he knew he had to himself pay (at least) a dollar with respect to membership in the applicant, that he accepted the dollar offered to him by MacFarlane,

that he understood that the exchange of a dollar between MacFarlane and himself constituted a loan which had to be repaid, and that he did not indicate to anyone either that he did not intend to repay the loan, or that he had not, in his view, in fact repaid it until well after the event. He also stated that he and MacFarlane often exchanged small amounts of money for coffee etc. Finally, Pugsley testified that he telephoned Ferreira on August 29, 1988 in an effort to “cancel” or “destroy the contract”; that is, his membership in the applicant. This illustrates that he is not a diffident individual and that he considered himself to have become a member of the applicant and that he himself considered that he had paid the dollar that was required in that respect on his own behalf. It is apparent that Craig Pugsley had changed his mind and that the story of the harassment by the applicant and that loan was not *bona fide* and had not been repaid was one which he contrived after his unsuccessful telephone approach to Ferreira.

17. The evidence also reveals that Ferreira, having made it clear that the loan was one which had to be repaid, did make an effort to find out whether or not it had been. Because Craig Pugsley was avoiding him, Ferreira was unable to speak to him about it. Ferreira did speak to MacFarlane about it, however, and, we find, MacFarlane advised him that it had been repaid. We note that neither Craig Pugsley nor Ferreira mentioned the loan in a telephone conversation referred to in paragraph 16 above. In the circumstances, including the allegations of arguably improper conduct by the respondent which Craig Pugsley made in the course of the conversation, it is not surprising that Ferreira’s attention was focused elsewhere. It is interesting that Craig Pugsley did not raise it, however, and this also suggests that Pugsley himself considered at that time that he had paid a dollar with respect to membership in the applicant.

18. In *Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. Aug. 735, one employee lent another employee \$1.00 which the latter gave to the union organizer with a signed application for membership card. There was no discussion about any need to repay the \$1.00 and it was never in fact repaid. The loan was not disclosed on the applicant’s Form 80 declaration. The respondent in that case submitted that the employee who had “borrowed” the dollar had not really paid it to the union “on his own behalf” as required by section 1(1)(1) of the *Labour Relations Act* and that the membership evidence to which it related should be disregarded. It also argued that because the Form 80 in that case did not disclose the loan, it, and therefore all the membership evidence to which it related, were invalid. The Board rejected that argument as follows:

9. Whatever may have been the case 35 years ago when *RCA Victor* was decided (when, it might be noted, there was no provision in the *Labour Relations Act* equivalent to section 1(1)(1)), it is obvious, today, that a payment of one dollar cannot realistically be considered to be much of a “financial sacrifice”. Its purpose is symbolic, and to provide a simple statutory formula for determining union membership without, in each case, an inquiry into the terms of the union constitution defining initiation requirements, membership obligations and so on. In order to facilitate the processing of certification applications (which now number well over a thousand each year), the Legislature has established a simple standard of “membership” for statutory purposes. It is important that trade unions relying on that formula adhere to the prescribed standard. Ordinarily, the membership evidence is not revealed to the employer (see section 111 of the Act and *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223), and against that background the Board is entitled to demand strict compliance with the statutory requirements. Failure to collect the \$1.00 payment contemplated by the Act, or to conduct the inquiries necessary to complete the Form 80 declaration, can result in the rejection of the union’s membership evidence and a dismissal of the application.

10. On the other hand, there comes a point when technical adherence to alleged “rules” drifts into artificiality and becomes increasingly remote from the real life experience of employees in the work place, whose interests must also be considered if the Board is to faithfully fulfill its statutory mandate. Does the ordinary employee in a plant, or on a construction site, seriously distinguish between a “bona fide” loan of a dollar which s/he “solemnly” undertakes to repay, or an outright gift of what, today, is a nominal amount? Does a dollar received by an employee

in this way cease to be "his own", to use as s/he wishes, because it may be a gift, or there may be no undertaking or real concern about its repayment? We do not think so; moreover, as early as 1958 in *Webster Air Equipment Co. Ltd.*, 58 CLLC ¶18,110 the Board indicated that it was "not greatly concerned about isolated instances of money being advanced by one employee to another". The Board recognized that these cash transfers were a natural incident of an established relationship between fellow employees who accommodate each other, from time to time, when they are short of funds. Usually there is an expectation of reciprocity, but no one keeps a ledger cataloguing the number of cups of coffee, soft drinks, muffins, chocolate bars or small sums owed to, or by, a fellow employee.

11. What the Board was suggesting in *Webster Air Equipment*, and what we here confirm, is that the Board will not ordinarily be concerned about the advance of small sums of money from one rank-and-file employee to another whether by way of "gift" or "loan", nor will they be the subject of Board scrutiny, unless the evidence suggests that a union official or the "collector" or perhaps some fervent union supporter was, in effect, "buying memberships". In such cases the Board might well disregard the membership documents, altogether or seek the confirmatory evidence of a representation vote. However, it is totally artificial and unrealistic to focus upon the expressed or presumed "intent to repay" of an individual employee in respect of the relatively trivial sum necessary to meet a statutory requirement which today is merely symbolic.

12. In the instant case we are satisfied that Mr. Comeau, to the extent that he thought about it at all, intended to and would have repaid the dollar to Mr. Luna, if Mr. Luna had raised the matter or really expected formal repayment; or, alternatively, that this minor amount was a gift, to be used by Mr. Comeau as he sat fit - either to buy a coffee or, in this case, to provide the token amount required to confirm his written intention to join the trade union and week its representation. The transfer of one dollar from Mr. Luna to Mr. Comeau was a private arrangement, and, once consummated, left Mr. Comeau with a dollar to dispose of as he pleased. It was his money which was tendered on his own behalf to support his written signification that he wished to join and be represented by a trade union.

13. In conclusion then, whether the origin of the dollar in question is characterized as a "gift" or a "loan" we are satisfied that it was Mr. Comeau's money to do with as he pleased, and that advancing that sum in support of his application for union membership meets the requirements of section 1(1)(l) of the Act and provides the requisite confirmation of the written document contemplated by the statute. That being so, there is no error, omission or misstatement on the Form 80 declaration. While it might well have been wiser for the union organizer to note the long/gift that he had witnessed, (because that might have avoided these proceedings and considerable delay), we do not think that there was anything improper in his failure to do so.

19. We agree with the Board's reasoning in *Calvano Lumber & Trim Co. Ltd.*, *supra* and find it generally applicable to this case. Moreover, to the extent that paragraph 12 of that decision suggests that some element of subjective intent may be relevant, we are satisfied that had anyone inquired of him at the time the loan was made, Craig Pugsley would have acknowledged an obligation to repay it and that he was making the payment to the applicant on his own behalf. The fact that he subsequently changed his mind does not detract from the *bona fides* of the loan transaction or his membership card. (Indeed, we are satisfied, on a balance of probabilities, that the loan was repaid as part of the subsequent repayment of \$4.00 and change by Craig Pugsley to MacFarlane.) Further, however enthusiastic a supporter of the applicant MacFarlane was, there is no suggestion in the evidence that anyone was buying Craig Pugsley's membership or that the transaction between Craig Pugsley and MacFarlane was any more than a natural incident of the relationship between them. Consequently, *N. A. Constructions*, [1982] OLRB Rep. Jan. 77, *Belair Restoration (Ontario) Inc.*, [1987] OLRB Rep. Feb. 183 and *Dough Delight Ltd.*, [1986] OLRB Rep. May 603, upon which the respondent relied, are readily distinguishable from the situation before the Board in this case. In the result, the Board found that the money which Craig Pugsley received from MacFarlane was his to do with as he wished and that he tendered it on his own behalf to support his application for membership in the applicant.

20. We agree with the respondent's submissions that the highest level of integrity must be required of a trade union applying for certification in the collection and presentation of the membership evidence it offers to the Board, and in the preparation and presentation to the Board of the requisite Declaration Concerning Membership Documents (in Form 9 or Form 80, as the case may be) which attests to the regularity and sufficiency of that membership evidence. A trade union must take all reasonable necessary steps to ensure that its membership evidence and Declaration with respect thereto truly and accurately represent what transpired. Consequently, the Board takes a very strict view of undisclosed defects or inaccuracies which are subsequently exposed (see *Kitchener News Company Limited*, [1980] OLRB Rep. Nov. 1656; *Westinghouse Canada Inc.*, [1986] OLRB Rep. Feb. 295; *Grand & Toy Limited*, *supra*; *Pebrs Peterborough Inc.*, [1988] OLRB Rep. Jan. 76; *P & M Electric (1982) Ltd.*, [1988] OLRB Rep. Aug. 843). As the cases illustrate, the declaration which must accompany membership evidence filed in support of an application for certification must be based on the personal knowledge or reasonable inquiries made by the declarant. What inquiries are reasonable will depend on the circumstances. The declarant must however have sufficient knowledge or information to enable him/her to attest that the persons shown to be collectors were the persons who actually collected the money, that each person with respect to whom a membership evidence is filed paid the amount shown on the membership evidence documents on his/her own behalf to the named collector. Any exceptions to what appears on the face of the documentary evidence of membership must be set out in the declaration.

21. We are satisfied that Ferreira, the Form 80 declarant in this case, made sufficient inquiries to enable him to complete the Form 80 declaration and, further, that there were no defects or deficiencies in that declaration. Although it may be prudent to question all persons involved in membership evidence transactions, it is not generally necessary to do so (one would not, for example, expect a declarant to speak to every employee as well as every collector with respect to membership evidence s/he has no personal knowledge of). In this case, Ferreira was himself the collector of Craig Pugsley's card, took reasonable steps to ensure that Craig Pugsley and MacFarlane understood the significance of the loan between them, made reasonable subsequent inquiries (considering that Pugsley was avoiding him), and could not have known that Pugsley was asserting that he had not repaid that \$1.00 loan and that he was not intending to repay it. Further, Ferreira did reveal the loan transaction on the Form 80 declaration which is generally, in our view, a prudent though unnecessary thing to do (see *Calvano Lumber & Trim Co. Ltd.*, *supra*, at para. 13). In the result, the Board was satisfied that there was no defect in the applicant's Form 80 Declaration.

22. Subsequent to making the aforesaid ruling with respect to the applicant's membership evidence, the Board heard the representations of the parties with respect to the report of the Labour Relations Officer previously authorized by the Board to inquire into and report to the Board with respect to the list of employees in the bargaining unit. By decision dated June 15, 1989, the Board accepted the agreement of the parties that Robert Tremells should be excluded, and that Harold Johnson, Michael Pentz and Frank Quigley and Jeff Verbaas should be included on the list of employees. The Board further ruled that Guy Hammond, Ian Nish, David Owen and David Waters should all be excluded from the list of employees and that Ian Pugsley should be included on it. The Board went on to find that the applicant had sufficient membership support among the employees in the bargaining unit at the time the application was made to be certified as the exclusive bargaining agent therefore. The Board therefore issued two certificates to the applicant, pursuant to section 144(2) of the Act, as set out in paragraphs 7 and 8 of that decision. The Board's reasons for ruling as it did with respect to those of the applicant's challenges of which the parties were unable to resolve as between themselves follow.

23. First, we note that, in argument, counsel for the respondent submitted that even if the

Board found that Owen, Nish and Hammond were not construction labourers on the date of application, it should include them in the bargaining unit because they shared a community of interest, on the basis of the tests set out in *Usarco Ltd.* [1967] OLRB Sept. 526, with construction labourers in the bargaining unit, and in order to avoid a fragmentation of employees into different bargaining units. We note that the community of interest tests in *Usarco Ltd.*, *supra*, are used to determine the bargaining unit which is appropriate for collective bargaining. In this case, the parties agreed and the Board found (in its November 4, 1988 decision) a unit of construction labourers described in the manner which reflects the standard construction labourers in a bargaining unit to be appropriate. Consequently, an employee who is not a construction labourer cannot be included in it for certification purposes. Moreover, as the Board pointed out in *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254, the nature of the construction industry and the development of trade union representation in it on a craft or trade basis has created a situation where the fragmentation of bargaining units on the basis of crafts or trades has been (and is) the rule rather than the exception. For craft bargaining units, community of interest is primarily determined and has largely been resolved on the basis of the skills and working conditions which distinguish employees engaged in one craft or trade from those engaged in another. Finally, we note that there was no suggestion that any of the carpenters or employees in any other trade which, were or may be from time to time, be employed by the respondent should be included in the bargaining unit herein as "construction labourers" or otherwise on the basis of any community of interest. In the result, we were not persuaded that anyone who was not a construction labourer on the date of application should be included in the bargaining unit herein for the purpose of this application.

24. The evidence in the Labour Relations Officer's report reveals that the time cards submitted by the respondent are not a particularly reliable indicator of what the employees to whom they relate did on any given day. These time cards were not used for costing purposes. Indeed, it is evident from the testimony of Jim McGown and Robert Scott (both of whom are project superintendents for the respondent at all material times) that their only real purpose was to ensure that employees were paid for all the hours they worked, rather to record what work they did or even when they actually worked. For example, the respondent agreed that the time card of one of the employees who had been challenged by the applicant, Robert Tremells, was inaccurate except insofar as it indicated the total number of hours he worked. With respect to another employee, Waters, Scott's testimony revealed that some of his time cards were mocked up so that a pay cheque could be generated for hours which had been worked during a previous pay period but not been paid for. The evidence also reveals that the time cards for Owen and Hammond do not necessarily reflect the work that they did either. Finally, the evidence revealed that the time cards were completed in varying degrees of detail depending on which of several people completed them, whether they were completed on the basis of personal knowledge or on the basis of information received from someone else, and when they were completed (relative to how busy the person completing them was and when they were required for payroll purposes). In that regard, we note that McGown admitted that the people who completed the sheets (including, it appears, himself) were "kind of lazy at times" in filling out the time cards and that "if [an employee] has worked half the day doing one thing and half a day doing the other sometimes we will put him in for the whole day, one day put one thing in for ease of time sheets and the next we will put him in to a different thing for eight hours so that ... to try and make filling the time sheets out perhaps a little easier, and tend to be his hours for maybe two days." Consequently, the Board gave the respondent's time cards little weight as a general matter, and no weight where they conflict it with other evidence which the Board considered to be cogent and reliable. Because Scott's testimony was based largely on the very time cards which we found to be unreliable, his evidence with respect to the matters in issue is similarly unreliable. For that reason, and because it appeared that he tended to tailor his testimony to what appeared to be in the respondent's best interest, the Board gave Scott's testimony little weight.

25. The evidence with respect to David Owen was less than satisfactory. However, it does reveal that he was considered by the respondent to be its regular and preferred truck driver for the purpose of picking up materials and delivering them to job sites. He also considered himself to be, and was considered by at least some other employees to be, a truck driver. Although he did do demolition and clean-up work as well, he estimated that he spent at least half of most working days driving a truck. On some days he did little or no driving and on others he spent the whole day driving. There was little reliable evidence with respect to what Owen did on the date of application. In that respect, we note that the time cards, which contained no indication that Owen spent any time driving, are wholly inconsistent with the *viva voce* evidence before the Board. Accordingly, these time cards are, in our view, completely unreliable as evidence of what Owen did during any particular day or week, and particularly with respect to what he did on the date of application, and we therefore gave them no weight. On balance, and having regard to the evidence as a whole, however, we were satisfied that it was more probable than not that Owen spent a majority of his time on the date of application working as a truck driver in the construction industry (see *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41; *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220; *Runnymede Development Corporation Limited*, [1988] OLRB Rep. Sept. 976). However, truck drivers are not included in a bargaining unit of construction labourers. Accordingly, the Board ruled that Owen should be excluded from the list of employees.

26. There was no doubt that Guy Hammond was the principal hoist operator at the respondent's Elgin Theatre job site and that he spent at least half of his time operating a hoist. On his estimate, which we accepted, he generally worked five to 6 hours out of every 8 as a hoist operator. The evidence is also quite clear that Ian Nish was the respondent's hoist operator at its 393 University Avenue job site. Neither Hammond or Nish spent all of their time as hoist operators. Both spent some of their time performing demolition and clean-up work completely unrelated to the operation of the hoist. In addition to actually operating a hoist, Hammond and Nish assisted in loading and unloading it, and were responsible for cleaning up around the hoist. In our view, none of this detracts from the fact that their primary responsibility was to operate, and to be available to operate, a hoist. A hoist operator does not cease to be a hoist operator because he performs work associated with a hoist (like, for example, loading or unloading the hoist, or cleaning up around a hoist) any more than he ceases to be a hoist operator if s/he stands idle in or around the hoist while it is not operating for some reason. Although the evidence with respect to what work Hammond did on the date of application is less than satisfactory, the evidence taken as a whole suggests that it is more probable than not that he spent at least a majority of his time on that day performing hoist-related work. The evidence with respect to Nish was clear and led us to conclude that he also spent at least the majority of his time on the date of application performing hoist related work. Consequently, we found Hammond and Nish to be hoist operators for purposes of this application. As such, they were not construction labourers and were not properly included on the list of employees (see *H & D Construction*, [1987] OLRB Rep. Dec. 1495).

27. The applicant and the respondent agreed that Ian Pugsley and David Waters performed the work of construction labourers when they worked for the respondent. They could not, however, agree whether they, or either of them, were at work on the date of application. The applicant asserted that Ian Pugsley was at work and that Waters was not. The respondent took the contrary position in each case.

28. Both parties agreed that Waters was a part-time employee. Although Scott suggested that Waters worked some week-days in August, 1988, he had no personal knowledge that that was the case. That seemed somewhat odd since Scott, who was the project superintendent at the project at which Waters worked, worked every week-day (according to his own testimony) and one would expect him to have *some* personal knowledge of Waters' working hours. Waters' time cards

were of no assistance because they were completed without regard to the days on which he actually worked. Their purpose was to ensure only that Waters was paid for the appropriate number of hours. There is no indication that any of the other employees knew him to work weekdays in August 1988 or that any one had seen him on the date of application. Finally, Waters himself did not recall working any more than a weekend or two for the respondent in August 1988. Consequently, we were satisfied that it was more probable than not that Waters was not at work on the date of application and that he should therefore be excluded from the list of employees.

29. Ian Pugsley worked for both the respondent and another company, the Brick Doctor, in August 1988. In our view, there was no cogent evidence which suggested that he was not working as a construction labourer for the respondent on the date of application. Nor was there any cogent evidence which tended to contradict Ian Pugsley's assertion that he worked for the Brick Doctor, then for the respondent, and then briefly for the Brick Doctor again in August 1988. On balance, the evidence suggests that it was more probable than not that Ian Pugsley was at work as a construction labourer for the respondent on the date of application and that he should therefore be included on the list of employees.

30. We note that the complaint in Board File No. 1352-88-U herein was subsequently withdrawn with leave of the Board.

2842-88-R; 2875-88-R Ontario Public School Teachers' Federation, Applicant v. The Muskoka Board of Education, Respondent v. Ontario Secondary School Teachers' Federation, Intervener; Ontario Public School Teachers' Federation, Applicant v. The Peel Board of Education, Respondent v. Ontario Secondary School Teachers' Federation, Intervener

Bargaining Unit - Certification - School Boards and Teachers Collective Negotiations Act - Whether supply instructors should be included in a unit of occasional teachers - Evolution in collective bargaining practice toward inclusion of supply instructors with occasional teachers in a single unit -Unit including both supply instructors and occasional teachers appropriate -Certificates issuing

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

APPEARANCES: *Kathleen Martin* and *Duncan A. Jewell* for the applicant; *Michael McCleery* for the respondent Muskoka Board of Education and *Paul Young, Martin A. Fowler, Jim Gollert* and *Neil Gillies* for the respondent Peel Board of Education; *Maurice A. Green* for the intervener.

DECISION OF THE BOARD; July 10, 1989

1. These are two applications for certification in which pre-hearing representation votes were conducted at the request of the applicant, which is a trade union as defined by clause 1(1)(p) of the *Labour Relations Act* ("the Act"). In each case the applicant seeks, as it does in a number of other pending applications, to be certified as exclusive bargaining agent for a unit consisting of "all occasional teachers and supply instructors employed by the [respondent] in its elementary panel" in the geographic area served by the respondent, with the usual exclusion of "persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards*

and *Teachers Collective Negotiations Act*". The term "occasional teacher" has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, and the term "supply instructor" means persons referred to in section 22(1) of Ontario Regulation 262 as amended by O. Reg. 233/88. In each of these applications the respondent agrees that the unit sought is appropriate (as did the respondent in the *Huron County Board of Education*, decision referred to in the next paragraph).

2. In each of the decisions which directed that pre-hearing representation votes be conducted in these matters, the Board made these observations:

In an as yet unreported decision dated February 17, 1989 in *The Huron County Board of Education*, (Board File No. 2473-88-R), the Board noted that the proposition that "supply instructors" should be included in a unit of occasional teachers was one which the Board had not previously accepted:

3. Occasional teacher bargaining units have been the subject of considerable analysis by the Board: see, for example, *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273 (the first case dealing with an occasional teachers application); *The Board of Education for the City of York*, [1985] OLRB Rep. May 767 (setting out the test for eligibility for "the count" and voters list); and *The Sault Ste. Marie Board of Education*, [1987] OLRB Rep. Nov. 1425 (dealing with the history of occasional teacher cases and the complexities arising from the coverage of some teachers under the *School Boards and Teachers Collective Negotiations Act* and other teachers under the *Labour Relations Act*). In *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18, the Board had occasion to consider whether it should grant a unit comprised only of occasional teachers, as requested by the applicant, or one comprised of occasional teachers and supply instructors as requested by the respondent. It determined that the applicant's unit was appropriate and therefore did not actually decide whether a unit including both occasional teachers and supply instructors was appropriate, although it suggested that on the facts in that case "each group ha[d] a different and distinct community of interest".

The Board there directed that ballots cast by supply instructors in the pre-hearing representation vote be segregated and not counted pending a hearing which it directed be scheduled following the vote so that the parties to that application could adduce evidence and make submissions justifying their bargaining unit proposal.

After similarly directing that a vote be conducted in a voting constituency consisting of occasional teachers and supply instructors and that any ballots marked by supply and instructors be segregated and not counted, the earlier decisions in these two applications also made these observations:

7. In the written submissions they file after receiving Notice of the Returning Officers Report, the applicant and respondent should elaborate on their joint assertion that occasional teachers and "supply instructors" share a sufficient community of interest to warrant including them in one unit. They might also address whether a "teacher/instructor" unit which includes more than occasional teachers should also include

- a) those instructors (i.e. persons employed to teach who do not have the qualifications of a "teacher") whose employment by the school board is not restricted by section 22 of Regulation 262 (e.g., continuing education instructors);
- b) those qualified teachers who, although not occasional teachers, will be excluded from the scope of the *School Boards and Teachers Collective Negotiations Act* when the *Education Amendment Act, 1989* (Bill 70) comes into force on May 1, 1989 (i.e. qualified teachers employed as "continuing education instructor" within the meaning of the Act otherwise than on a contract in writing in a form prescribed by regulations under the *Education Act*.)

If no affected party requests a hearing within the time specified in subsection 70(2) of the Board's Rules of Procedure, the panel to which this application is then referred will determine whether such a hearing is nevertheless necessary in light of the parties' post-vote written submissions and the outcome (if there has then been one) of the application in Board File 2473-88-R.

The request in the *Huron County Board of Education* application that supply instructors be included in a bargaining unit with occasional teachers was later abandoned, so the propriety of doing so was not considered in that application. These applications were listed for hearing to consider that question.

The Terms "Occasional Teacher" and "Supply Instructor"

3. The *Education Act*, R.S.O. 1980, c.129, as amended, defines "occasional teacher" in subsection 1(1) as follows:

31. "occasional teacher" means *a teacher* employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year;

[emphasis added]

Subsection 1(1) of the *Education Act* defines the word "teacher" as follows:

66. "teacher" means a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or a secondary school in Ontario;

4. The term "supply instructor" seems first to have been used in the following passage from *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18:

It is important not to lose sight of the fact that the word "teacher" has a narrow and technical definition in the statutory framework imposed on the labour relations between school boards and those who might fall within a common or dictionary definition of "teacher." In order to maintain the necessary distinctions in what follows, unless we expressly indicate otherwise the word "teacher" will describe only those who fall within the definition of "teacher" in subsection 1(1) of the *Education Act*. A person who is not a "teacher" but is employed by the school board to "teach" in the ordinary sense will be referred to as an "instructor." The phrase "occasional teacher" will be used to describe only those who fall within the definition of that term in subsection 1(1) of the *Education Act*. A person who does not fall within that definition but is employed to teach as a substitute for a teacher or instructor for a temporary period will be referred to as a "supply instructor."

3. A general theme of the *Education Act* and Regulations thereunder is that those who teach in schools must be "teachers" within the meaning of that Act. There are various limited exceptions to this general rule. By way of example, subsection 9(5) of Regulation 262 under the *Education Act* provides:

- (5) A board may employ a person who is not a teacher to teach in a continuing education class a course that is not to be recognized for credit provided such person holds qualifications acceptable to the board for such employment.

(It is pursuant to this exception to the general rule that instructors dealt with in the *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900 and *Metropolitan Separate School Board*, [1986] OLRB Rep. Sept. 1259, could be employed to "teach.") The provision which permits the respondent to employ supply instructors to perform work which would ordinarily be performed by occasional teachers is found in subsection 22(1) of Regulation 262 as amended by O. Reg. 617/81, section 18:

22.-(1) Subject to subsection (2), a board may, in the case of an emergency, appoint an unqualified person to teach for not more than ten school days in a school year without obtaining a Letter of Permission under section 49 of Regulation 269 of Revised Regulations of Ontario, 1980.

Under the section of Regulation 269 referred to in the provision just quoted, the Minister of Education cannot grant a Letter of Permission authorizing employment of an unqualified person unless the position for which that person is to be employed has been advertised extensively and the school board seeking the letter establishes that no teacher has both applied for and accepted the position in question. Generally speaking, there are more teachers currently seeking full-time positions than there are positions to be filled.

Since that decision, section 22 of Ontario Regulation 262 has been revoked by section 11 of O. Reg. 233/88, which substituted the following:

APPOINTMENT TO TEACH IN THE CASE OF AN EMERGENCY

22. (1) Where no teacher is available, a board may appoint, subject to section 22a, a person who is not a teacher or a temporary teacher.

(2) A person appointed under the subsection (1) shall be eighteen years of age or older and the holder of an Ontario secondary school diploma, a secondary school graduation diploma or a secondary school honour graduation diploma.

(3) An appointment under this section is valid for ten school days commencing with the day on which the person is appointed. O. Reg. 233/88, s.11.

This Board's jurisdiction over "Teachers" and "Instructors"

5. The extent of our jurisdiction over labour relations between school boards and those they employ to "teach" (in the ordinary sense of that term) was described in the following portion of the decision in *Carleton Roman Catholic Separate School Board*, *supra*:

14. In matters involving the employment of persons to perform a teaching function, the legislature has chosen to make statutorily defined qualifications determinative not only of the work which those persons may perform but also of the collective bargaining regime by which their employment may be governed. The legislature thought it important that collective bargaining for teachers be governed by legislation quite different from the *Labour Relations Act*. It is not apparent why teachers whose employment is "casual" were excluded from the collective bargaining regime governing teachers whose employment is "permanent." Except in a narrow range of employment situations (seasonal employment in the tobacco and canning industries) the characteristics of which are not shared by occasional teacher employment, this Board has consistently rejected the notion that "casual" workers should be excluded from units of "permanent" workers: *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713; *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371. The fact remains, however, that occasional teachers are not covered by Bill 100, and collective bargaining for them falls, by default, under the *Labour Relations Act*.

15. The application to occasional teachers of the *Labour Relations Act* and of the Board's jurisprudence has been influenced by the "casual" nature of their employment and their very strong affinity with their professional colleagues in Bill 100 units. The Board commented on this in *Metropolitan Separate School Board*, *supra*, at paragraph 25:

25. The first occasion on which this Board had to consider the applicability of its general practices, procedures and doctrines to a certification application affecting occasional teachers was in *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Mar. 466. One of the issues in that case was whether the Board would apply its "30-30" rule to determine which persons were "employed" in the occasional teacher bargaining unit at relevant times. It concluded it would. The Board rejected that conclusion and adopted a special test for occasional teachers in *Board of Education for*

the City of York, [1985] OLRB Rep. May 767, which was the next decision to address that question. As will be apparent from that decision and from the passage quoted earlier from *Board of Education for the Borough of Scarborough*, *supra*, occasional teachers are not a group which would have been excluded from a unit of certified teachers if it had fallen to this Board to define such a unit in accordance with the principles it has developed over the years. This observation is not made as part of a critique of Bill 100, but simply to highlight a fact peculiar to the "education industry", the ramifications of which have led the Board to adopt a different approach to matters involving occasional teachers. In the same vein, it is noteworthy that the Board's approach to appropriate composition of occasional teacher bargaining units has been so influenced by the peculiarities of Bill 100 as to have results which would not occur in another industry - such as the definition of units in terms of the language in which employees work, for example: see, *Le Conseil Scolaire d'Ottawa*, [1985] OLRB Rep. July 1090.

Since its decision in the *Board of Education for the City of Toronto*, [1983] OLRB Rep. March 466, the Board has dealt with dozens of applications for certification for units consisting solely of occasional teachers. It has consistently found such units to be appropriate for collective bargaining. The reasons for this were briefly stated in the Board's decision in *Windsor Roman Catholic Separate School Board*, [1986] OLRB Rep. July 1028 at paragraph 6:

• • •

It has been the Board's experience that until relatively recently school boards and unions that represent their non-teacher employees have not thought of occasional teachers as employees who might be the subject of or affected by collective bargaining under the *Labour Relations Act*. When they have been the subject of trade union organizing, they have been organized separately from other employee groups. Because of their affinity with "Bill 100" teachers, the Board has placed them in separate bargaining units -- if effect, "tag ends" to Bill 100 units

16. Certification applications with respect to instructors are even more recent phenomena than applications with respect to occasional teachers. Composition of units of instructors has been addressed in two decisions: *The Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900; and, *Metropolitan Separate School Board*, *supra*. In both cases, units of the respondents' occasional teachers had been the subject of certification before applications were brought with respect to instructors. Although those decisions did not speak directly to the situation of instructors who substitute for Bill 100 teachers, such persons were included with all other instructors in the unit established in *Metropolitan Separate School Board*. All instructors fall within the *Labour Relations Act*, and it would be inconsistent with this Board's jurisprudence to separate supply instructors from other instructors in composing bargaining units.

The Facts in These Applications

6. The applicant and the Peel Board of Education agree on the following facts:

1. The Peel Board of Education has a list of occasional teachers who are available as substitutes for permanent, probationary or temporary teachers, when such teachers are absent from their duties. When a permanent, probationary or temporary teacher is absent, a principal or vice-principal of the school where the teacher is absent, contacts a dispatcher who arranges for an occasional teacher to substitute for them from the list of occasional teachers. If the dispatcher is unable to find an occasional teacher to substitute for the permanent, probationary or temporary teacher, then the principal or vice-principal is responsible for arranging coverage for the class taught by the permanent, probationary or temporary teacher.

2. The Peel Board of Education has a policy which provides that supply

instructors can be used in cases of emergency to substitute for permanent, probationary or temporary teachers. There is no definition of "emergency" in this policy. However, in general, when the dispatcher is unable to find an occasional teacher to substitute for a permanent, probationary or temporary teacher who is absent, the principal will often rely on his or her own list of supply instructors to fill in for the absent teacher.

3. The occasional teacher or supply instructor perform the same work when they are employed as a substitute for a permanent, probationary to temporary teacher. In particular, the occasional teacher or supply instructor will follow the lesson plan and perform any supervisory duties, such as yard duties or lunch room duties, as required.

4. The supervision of occasional teachers and supply instructors is performed by either the principal or vice-principal of the permanent, probationary or temporary teacher.

5. At the present time, the rate of pay of occasional teachers and supply instructors is set by Board policy. With respect to the rate, occasional teachers are paid \$110.00 per day, whereas supply instructors are paid \$65.00 per day.

6. With respect to their background, occasional teachers have an Ontario Teachers' Certificate, whereas supply instructors have varying degrees of education training, ranging from a teachers' certificate from another jurisdiction to an Ontario University degree to high school training.

7. The long-term interest of occasional teachers and supply instructors varies. With respect to occasional teachers, such teachers are often interested in gaining teaching experience with a long-term goal of actually becoming a permanent, probationary or temporary teacher or may simply want to earn extra money. In comparison, with respect to supply instructors, some supply instructors want to gain teaching experience since they are interested in obtaining their Ontario Teachers' Certificate at some future point in time, whereas others simply want to earn additional money.

The list referred to in paragraph 1 is maintained centrally and updated by the school board's Human Resources Department in June of each year pursuant to a standard practice. The creation and maintenance of the individual principals' lists of supply instructors referred to in paragraph 2 is not the subject of any standard practice. Persons on these lists only become the subject of a record in the school board's administrative offices if they come to be employed for any period of time, in which case the particulars of their employment will remain in the school board's computer for approximately eighteen months. Supply instructors are not used very often. The parties estimate that there are "thousands" of person-days of occasional teacher employment each year. In the same period, supply instructors would be employed for considerably less than one hundred person-days. With respect to the reference in paragraph 7 to supply instructors' interest in obtaining Ontario Teachers' Certificates, we were told that candidates with prior teaching (or, perhaps, "instructing") experience are given favourable consideration by Colleges of Education in determining entrance to the educational programs which are a prerequisite to an Ontario Teachers' Certificate.

7. The applicant and the Muskoka Board of Education agreed on the following facts:

1. The Muskoka Board of Education has a list of occasional teachers and supply instructors who are available as substitutes for permanent, probationary or temporary teachers, when such teachers are absent from their duties. The list contains approximately 60 to 70 names of such persons, of which four of five are supply instructors.
2. When a substitute is required for a teacher, the principal of a school will initially seek to obtain the services of an occasional teacher. When an occasional teacher is unavailable, the principal will seek to obtain the services of a supply instructor.
3. The occasional teacher or supply instructor perform the same work when they are employed as a substitute for a teacher. In particular, the occasional teacher or supply instructor will follow the lesson plan and perform any supervisory duties, such as yard duties or lunchroom duties, as required.
4. The supervision of occasional teachers and supply instructors is performed by either the principal or vice-principal of the teacher for which the occasional teachers or supply instructors are substituting.
5. At the present time, the rate of pay of occasional teachers and supply instructors is set by Board practice. Supply instructors are paid less than occasional teachers.
6. With respect to their background, occasional teachers have an Ontario Teachers Certificate, whereas supply instructors have a variety of education training, ranging from a teachers certificate from another jurisdiction to a University degree from Ontario to high school training.
7. The long-term interest of occasional teachers varies. It ranges from gaining teaching experience with the long-term goal of actually becoming a permanent, probationary or temporary teacher to simply wanting to earn extra money. In comparison, the long-term interest of supply instructors also varies. Some supply instructors want to gain teaching experience since they are interested in obtaining their Ontario Teachers' Certificate at some future point in time. Others simply want to earn additional money or agree to assist a school which is in dire need of someone to be a substitute for a teacher.

The list referred to in paragraph 1 is updated on a regular basis. The positions in question are advertised annually. The frequency of use of occasional teachers versus supply instructors varies considerably among the fourteen elementary schools operated by the school board; schools in remote locations may have a very limited range of options when it becomes necessary to find the substitute for absent teacher.

8. The Ontario Secondary School Teachers' Federation ("OSSTF") was certified as bargaining agent for occasional teachers at both the Peel Board and the Muskoka Board. In both cases, after certification OSSTF sought and obtained voluntary recognition as representative of supply instructors, so that occasional teachers and supply instructors employed in the secondary panel are included in a single bargaining unit in both boards of education. The applicant advised us that it has been certified as exclusive bargaining agent for the occasional teachers of twenty-six school boards in Ontario. Since certification, twelve school boards have agreed to include supply instructors with the occasional teachers in a single unit covering the elementary panel.

Decision

9. The respondents' agreement that the units sought by the applicant are appropriate does not relieve us of our statutory obligation to make a finding in that regard.

10. There are a number of distinctions between the circumstances of these applications and those of the application dealt with in *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18. The reliance of the applicant during organizing on the Board's findings in previous cases was a significant factor in that decision. By contrast with the facts in that case, the facts before us show a considerable evolution of collective bargaining practice toward inclusion of supply instructors with occasional teachers in a single unit. The regulatory restriction on employment of anyone supply instructor for more than 10 days in a school year has been relaxed. The community of interest of occasional teachers is still different from that of supply instructors, but that does not mean that inclusion of both groups in one bargaining unit is inappropriate.

11. The Legislature still shows no inclination to include under one labour relations statute all those employed by school boards to "teach" or even all those "qualified teachers" so employed. Indeed, the latest amendments to the *Education Act* have excluded another category of qualified teacher from the ambit of the *School Boards and Teachers Collective Negotiations Act*. Because of the observations made in paragraph 7 of each of the earlier decisions in these applications, the applicant and respondents have considered whether those who "instruct" or "teach" otherwise than as substitutes for "regular" teachers and who fall under the *Labour Relations Act* for labour relations purposes should be included with occasional teachers and supply instructors in a single bargaining unit. They do not consider that desirable in either of these cases. If they are content, it does not seem inappropriate to us that occasional teachers should be in a different unit from those who do not function as substitutes for teachers.

12. It does not make sense to have supply instructors form a separate unit by themselves; in functional and practical terms it makes more sense to group them with occasional teachers than with a distinct unit of the other teachers and instructors who fall under the *Labour Relations Act*.

13. We find that the appropriate bargaining unit in Board File 2842-88-R consists of:

all occasional teachers and supply instructors employed by the Muskoka Board of Education in its elementary panel in the district of Muskoka save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*.

We find that the appropriate bargaining unit in Board File 2875-88-R consists of:

all occasional teachers and supply instructors employed by the Peel Board of Education in its elementary panel in the Region of Peel save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*.

In both cases, the term "occasional teacher" has the meaning assigned to it by section 1(1)(31) of the *Education Act*, and the term "supply instructor" means persons referred to in section 22(1) of Ontario Regulation 262 as amended by O. Reg. 233/88.

14. In each of these applications, the applicant and respondent were able to agree on the

list of persons who were “employees” in the bargaining unit on the application date. Accordingly, it was unnecessary for us to determine whether the test used in *Board of Education for the City of York*, [1985] OLRB Rep. May 767, should be applied in these applications to determine whether supply instructors (or occasional teachers, for that matter) who were not “at work” in the unit on the application date were nevertheless “employees” in that unit for the purposes of the Act. We leave open the question whether, having regard to the present provisions of section 22 of O. Reg. 262, a supply instructor last at work more than ten days before the terminal date could or should be considered to be an “employee” as of that date.

15. Having regard to the agreements of the applicant and respondent in each application, we are satisfied that in each application not less than thirty-five per cent of those employed in the appropriate bargaining unit were members of the applicant at the time the application was made. On the taking of the pre-hearing representation votes directed by the Board, in each application more than fifty per cent of the ballots cast were cast in favour of the applicant. (That would remain so if the one segregated ballot in Board File 2875-88-R were now cast, however it may have been marked.)

16. A certificate shall issue to the applicant with respect to each of the bargaining units described in paragraph 13.

17. The Registrar shall destroy the ballots cast in the pre-hearing representation votes taken in these matters following the expiration of 30 days from the date of this decision unless a statement requesting that ballots not be destroyed is received by the Board from a party to one of these applications before the expiration of such 30-day period.

0068-88-R; 0767-88-R; 1149-88-R; 1484-88-R; 1552-88-R; 2261-88-R; 2666-88-R
 Canadian Guards Association, Applicant v. **Pinkerton's of Canada Ltd.**,
 Respondent v. Richard Bibeault, Intervener; Canadian Guards Association,
 Applicant v. **Pinkerton's of Canada Ltd.**, Respondent; Canadian Guards Association,
 Applicant v. National Protective Services Company Limited, Respondent v.
 George Faulkenburg, Intervener; Canadian Guards Association, Applicant v.
 Board of Management for the Metropolitan Toronto Zoo, Respondent v. Interna-
 tional Union United Plant Guards Local 1962, Intervener #1 v. Ron Saxton,
 Intervener #2; Canadian Guards Association, Applicant v. Burns International
 Security Services Limited, Respondent v. Gordon A. Southorn, Intervener; Cana-
 dian Guards Association, Applicant v. Wackenhut of Canada Limited, Respon-
 dent v. Shane Freeman, Intervener; United Steelworkers of America v. **Pinker-
 ton's of Canada Ltd.**, Respondent v. Larry Bishop, Intervener

Adjournment - Certification - Charter of Rights and Freedoms - Issue in certification cases involving the effect of the Charter on the security guard provision in the Act - Whether Charter issue should be postponed pending the release of the final decision in *Cuddy Chicks* concerning the Board's jurisdiction to deal with Charter issues - Adjournment denied - Labour relations considerations favouring expedition

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *B. Shell* and *P. Turtle* for the applicants and the intervening employees; *M. J. Gleason* for Pinkerton's of Canada Ltd.; *George Monteith* for Board of Management for the Metropolitan Toronto Zoo; *Michael Gordon* and *Peter Whalen* for Burns International Security Services Limited; *Brian P. Smeenk* for Wackenhut of Canada Limited; *Harvey Beresford*, *Susan McDermott* and *W. J. Gretton* for Inco Limited; no one appeared for National Protective Services Company Limited.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK; July 25, 1989

1. These are seven applications for certification which were filed with the Board between April 11, 1988, and January 26, 1989, in respect of over a thousand security guards, hundreds of whom have expressed an appetite for collective bargaining by joining one of the applicant trade unions. This decision pertains to a motion by some of the parties that the Board postpone the hearing of issues which have arisen in these applications with respect to the effect of the *Canadian Charter of Rights and Freedoms* (the "Charter") on part of section 12 of the *Labour Relations Act*.

2. In a decision dated June 27, 1988 in respect of File No. 0068-88-R (*Pinkerton's of Canada Ltd.*, [1988] OLRB Rep. June 613), this panel of the Board wrote, in part, as follows:

1. This an application for certification. In Appendix A to its (Form 10) Reply, the respondent submitted that the application should be dismissed on the following grounds:

- a) Respondent's labour relations fall within the exclusive constitutional jurisdiction of the federal government and consequently are not subject to this Board's jurisdiction;
- b) Pursuant to section 12 of the Act, Applicant has no status to seek or acquire certification of Respondent's security guards by reason of Applicant's avowed affiliation with an organization that admits to membership persons other than security guards;
- c) Applicant's membership evidence is tainted "*in toto*" by reason of the active and illicit participation of a representative of management in Applicant's organizing campaign.

2. Prior to the June 1, 1988 hearing of this matter, the parties' representatives met with a Board Officer and, without prejudice to the respondent's position regarding the foregoing grounds, reached agreement on certain matters, including an agreement that notwithstanding the constitutional jurisdictional issue, the parties would request the Board to hear argument regarding section 12 first, before considering any other issues.

3. By letter dated May 26, 1988, counsel for the applicant advised the Board, the Attorney General for Ontario, the Attorney General for Canada, and respondent's counsel as follows in respect of this matter:

I am counsel to the Canadian Guards Association in the above captioned matter. An Application for Certification with respect to certain employees of the respondent was filed on April 11, 1988. I have conferred with counsel for the respondent in this matter and we have agreed that upon the commencement of the certification hearings in Ottawa on June 1, 1988 before the Ontario Labour Relations Board the first issue to be addressed will be the preliminary objection raised by the respondent that the Board should refuse to certify the applicant trade union pursuant to s.12 of the Labour Relations Act.

In reply to the respondent's position the trade union confirms that it will be taking the position that s.12 of the Act does not apply to bar certification because the trade union referred to above is not "affiliated, directly or indirectly, with an organization

that admits to membership persons other than guards". Alternatively the union will be arguing that a portion of s.12 should be struck down as it violates the guarantee of freedom of association contained in s.2 (d) of the Canadian Charter of Rights and Freedoms. The trade union takes the position that the portion of s.12 which states "... no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employer's organization shall be required to bargain with a trade union on behalf of any person who is a guard, if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly with an organization that admits to membership persons other than guards" constitutes a violation of the Charter. The union is not challenging that portion of s.12 which prohibits the inclusion in a bargaining unit with other employees a person employed as a guard to protect the property of an employer as constituting a violation of the Charter of Rights and Freedoms.

4. At the June 1, 1988 hearing of this matter, counsel advised the Board that they had further agreed to request the Board to hear and determine the issue of whether or not the applicant (also referred to in this decision as the "CGA") is "affiliated, directly or indirectly, with an organization which admits to membership persons other than guards" (the "section 12 issue") on the understanding that if the Board decided that it was, evidence and argument would be presented at a later date concerning the Charter issue. Since it appeared to the Board that the procedure suggested by the parties might expedite the hearing of the matter by avoiding unnecessary evidence and argument, the Board acceded to that request. Consequently, this decision deals only with the section 12 issue.

5. It is common ground between the parties that "the guards covered by the application protect the property of employers within the meaning of section 12 of the Act, and in accordance with the Board's caselaw dealing with conflict of interest, such that their duties include the surveillance and monitoring of both property and employees of employers". It is also common ground between the parties that the applicant has entered into the following contract (the "Service Contract") with the United Steelworkers of America (the "USWA")....

[The quotation of the Service Contract, which appears at pages 614-16 in the report of that decision, has been omitted.]

• • • •

10. Section 12 provides as follows:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

The purpose of that section is to protect against conflicts of interest between guards' duties to the employer whose property they are obliged to protect, and their expected loyalty to the employer's employees: see, generally, *Kimberly Clark of Canada Ltd.*, [1987] OLRB Rep. Oct. 1255; *Citicom Inc.*, [1985] OLRB Rep. Jan. 57; *Wells Fargo Armcar, Inc.*, [1981] OLRB Rep. July 1046; and *Canadian Paperworkers Union, Local 4 v. Fraser Inc.*, *supra*.

11. It is unnecessary in the instant case to attempt to exhaustively define the term "affiliated". It is sufficient for the purposes of this decision to indicate that, in our view, the portion of section 12 which is in issue in these proceedings covers contractual arrangements of the type contained in the Service Contract, and is not confined to situations in which unions are bound together or controlled by constitutional obligations. Thus, having duly considered the submissions of counsel and all of the material which has been placed before us, we have concluded that the applicant is "affiliated, directly or indirectly, with an organization which admits to membership persons other than guards", namely, the USWA. Under the terms of the Service Contract, the USWA is obliged to provide all support and technical services to the CGA and to the CGA's

members which the USWA provides to its own chartered local unions and to its own members. It is also required to make available to the CGA the USWA offices in Ontario. As a result of the latter provision, guards in the employ of the respondent were invited (by the letter quoted above), as part of the applicant's organizing campaign, to call a number which is answered "United Steelworkers of America". At least two-thirds of the dues paid by members of the CGA flow through to the USWA under the terms of the Service Contract, which also requires the CGA to provide the USWA with a complete list of all CGA bargaining units and, where possible, with a list of the names, addresses, and telephone numbers of all members of the CGA. It also obligates the CGA to co-operate and support the USWA in complying with all sections of the Act in the event that the USWA decides to seek to become the legal bargaining agent with respect to any or all locals of the CGA. The contract further stipulates that at least one employee or agent of the USWA shall be invited to attend every meeting of all locals of the CGA and that the employee or agent shall be entitled to participate in such meetings. Thus, in view of the very close relationship which exists between the CGA and the USWA under the terms of the Service Contract, we have concluded that the CGA is "affiliated, directly or indirectly," with the USWA within the meaning of section 12 of the Act.

12. For the foregoing reasons, the Board has concluded that unless the applicant's Charter argument is successful, section 12 will preclude the Board from certifying the applicant and requiring the respondent to bargain with the applicant on behalf of any of the respondent's guards, because the applicant is affiliated with an organization that admits to membership persons other than guards.

3. In an unreported decision dated December 7, 1988 in respect of File No. 1552-88-R, another panel of the Board chaired by the present Vice-Chair wrote, in part, as follows:

8. In the instant case, counsel for the applicant advised the Board that although he does not agree with the *Pinkerton's* decision, he accepts it as a decision of the Board and does not seek to relitigate the affiliation issue in the context of this case. The Charter argument asserted by the CGA in the *Pinkerton's* case is that a portion of section 12 violates the guarantee of freedom of association contained in section 2(d) of the *Canadian Charter of Rights and Freedoms*, and is not "saved" by section 1 of the Charter. The impugned part of section 12 provides as follows: "...no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards." That same issue has also been raised by the applicant in the instant case and in a number of other certification applications. In order to facilitate the determination of that matter, applicant's counsel has requested the Board to list this application and all of those other applications to be heard together in respect of the Charter argument. That request was made by applicant's counsel at the November 3, 1988 hearing of this matter, and was confirmed in the following letter dated November 8, 1988:

Re: Canadian Guards Association and Pinkerton's of Canada Ltd.; Application for Certification; Board File: 0068-88-R; Our File: OLRB-649A

Canadian Guards Association and Pinkerton's of Canada Ltd.; Application for Certification; Board File: 0767-88-R; Our File: OLRB-687

Canadian Guards Association and National Protective Services Company Limited; Application for Certification; Board File: 1149-88-R; Our File: OLRB-699

Canadian Guards Association and Board of Management For The Metropolitan Toronto Zoo; Application for Certification; Board File 1484-88-R; Our File OLRB-713

Canadian Guards Association and Burns International Security Services Limited; Application for Certification; Board File: 1552-88-R; Our File: OLRB-716

We are counsel to the applicant Canadian Guards Association in the above-captioned matters which are all outstanding before the Ontario Labour Relations Board. In all of these matters, an issue which must be determined by the Board before it can certify the applicant as bargaining agent for any of the respondents' employees is whether that portion of s.12 of the Labour Relations Act which precludes the certification of any union which is affiliated with an organization that admits to membership persons other than guards is of no force and effect as it is a violation of s.2(d) of the Charter of Rights and Freedoms. The applicant in all of the above-captioned matters takes the position that the portion of s.12 referred to above is an unconstitutional violation of freedom of association guaranteed by the Charter, and it is not "saved" by the provisions of s.1 of the Charter.

In order to make a determination as to the constitutionality of s.12 of the Labour Relations Act it will be necessary for the applicant and the respondent in each case to adduce detailed evidence of constitutional facts. Further, it will be necessary in each case for both parties to adduce evidence with respect to the "justification" of any possible infringement of the Charter pursuant to s.1 of the Charter of Rights.

In order to avoid unnecessary duplication of proceedings and of evidence and argument in this matter, the applicant respectfully requests that the Board convene a single hearing to address the Charter issue at which all parties may lead evidence and make representations before the Board. The applicant respectfully requests that the Board immediately schedule twenty to thirty hearing dates before July 1989 on a pre-emptory [sic] basis.

Further, the applicant respectfully requests that the Board schedule a pre-hearing conference before January 1, 1989 to be attended by all parties so that any preliminary and procedural issues can be dealt with.

I have sent copies of this letter to all interested parties of whom I am aware. Should the Board determine that any other person is an interested party in this matter, please ensure that such party receives a copy of this letter and future correspondence from the Board.

Thank you for your attention and assistance.

9. Copies of that letter were sent by the Registrar to each of the other parties to the applications referred to in the letter, and their counsel, as well as to the other interested party identified by counsel, along with the following letter:

I am enclosing herewith a copy of a letter dated November 8, 1988, from the solicitor for the applicant in the above matters, with respect to which I would appreciate receiving your written comments, if any, by November 21, 1988.

10. A number of responses have been received. In his written submissions, counsel for the respondent [Burns International Security Services Limited] indicated that his client is not opposed to a single hearing, but does not agree that the dates should be set on a pre-emptory basis. The respondent also agrees that a pre-hearing conference is appropriate, but requests that it be held in January. Counsel for the United Plant Guard Workers supports the applicant's request for a pre-hearing conference and for a single hearing to address the Charter issue. Counsel for the Board of Management for the Metropolitan Zoo has advised the Board that his client is prepared to consent to a single hearing to address the constitutionality of section 12 on the condition that all other parties agree to participate. However, he has also expressed opposition to dates being set pre-emptorily. Counsel for National Protective Services contends that the request is premature in that the CGA has also filed an application for certification with the Canada Labour Relations Board (the "CLRB") in respect of its employees, and is awaiting a decision by the CLRB on the constitutional aspect of that application. Accordingly, counsel for National Protective Services requests that the Board defer any hearing with respect to the Charter argument until the CLRB has ruled on the issue of its constitutional jurisdiction. Correspondence from counsel for Pinkerton's of Canada raises a similar concern regarding the potential for conflicting decisions and unnecessary expenditures, in view of the fact that the applicant has

also applied to the CLRB in respect of his client's employees working in Ottawa. Counsel advised the Board that if the CLRB decides to proceed with the certification application presently pending before it between the applicant and his client, he intends to request this Board to stay all proceedings in respect of the provincial application. He also indicated that his client has no objection to the Board convening a single hearing to consider the Charter issue provided that the CLRB does not determine to proceed with the federal application. However, he requested that the Board initially confine that hearing to the issue of whether section 12 infringes any substantive right guaranteed by the Charter, with the issue of the applicability of section 1 of the Charter being dealt with subsequently in the event that the Board finds an infringement. Pinkerton's of Canada is also opposed to dates being fixed without consultation, and requests that the pre-hearing conference and the hearings be held in Ottawa.

11. In a letter dated December 2, 1988, counsel for the applicant acknowledged receipt of the correspondence described in the preceding paragraph, and reiterated the positions asserted in his letter of November 8, 1988.

12. The following letter has been received from counsel for Inco Limited:

We are counsel for Inco Limited and have received a copy of a letter dated November 8th from Brian Shell, counsel for the United Steelworkers of America, in connection with the forthcoming Charter challenge to Section 12 of the Labour Relations Act.

As you know, the United Steelworkers of America and the Canadian Guards Association entered into a service contract which the Board has determined, in the Pinkerton's of Canada Ltd. case, to be contrary to Section 12 of the Act. Inco Limited has a collective bargaining relationship with the Canadian Guards Association with more than 90 guards in the bargaining unit, the largest, we believe, private sector guards unit in Canada. In addition, the United Steelworkers is the bargaining agent for all mining and smelting employees (in excess of 6500) for Inco Limited in the Sudbury district.

As a result of the Steelworker/Guards service contract, Inco Limited has had numerous discussions with both the Canadian Guards Association and the United Steelworkers of America concerning the application of Section 12 to this relationship.

For this reason, Inco Limited seeks status to attend before your Board and participate in the hearing on the Charter issue raised by Mr. Shell in his November 8th letter. It would be the intention of Inco Limited to call evidence, participate in the cross-examination of witnesses and make detailed submissions. As you can appreciate, the decision will have a direct affect [sic] on the relationship between Inco Limited and the Canadian Guards Association. We believe that by combining the interests in one hearing, the Board will avoid a multiplicity of hearings inasmuch as this matter will have to be determined to the satisfaction of Inco Limited in its own situation.

We look forward to a favourable response and, should it be necessary, will be pleased to make additional and detailed submissions with respect to the granting of Intervener status....

13. Having duly considered all of the submissions which have been received, we have concluded that this application should be listed for hearing together with File Nos. 0068-88-R, 0767-88-R, 1149-88-R, and 1484-88-R in respect of the Charter argument, and that a pre-hearing conference should be convened to facilitate that hearing. Accordingly, the Registrar is directed to schedule a pre-hearing conference in respect of this file and those other four files, and to list all five of them for hearing together in respect of the Charter argument (described in paragraph 8 of this decision), on such dates as are recommended by the pre-hearing conference Vice-Chair. Notice of hearing and notice of the pre-hearing conference is also to be given to Inco Limited, and to Wackenhut of Canada Ltd. (in view of the fact that the CGA filed a certification application (File No. 1944-88-R) in respect of some of its employees on November 15, 1988).

4. By letter dated February 9, 1989, counsel for the applicants and the intervening employ-

ees notified the Board and the representatives of the other parties that reliance will also be placed upon section 15 of the Charter in challenging the constitutional validity of the impugned portion of section 12 of the Act.

5. The pre-hearing conference directed by that decision was convened before Vice-Chair S. A. Tacon on February 10, 1989. In accordance with the Board's usual practice, Vice-Chair Tacon subsequently prepared a Memorandum that was forwarded by the Registrar to each of the parties and their representatives. The following is some of the information included in that Memorandum:

The following represents the various agreements and undertakings from the Pre-Hearing Conference on February 10, 1989. For convenience, I have grouped the items under headings which I regarded as appropriate.

SUBSTANTIVE ASPECTS

Agreed: "Test" cases are to be selected and their facts agreed on so that the evidence to be lead at the hearing will be restricted to the "Charter" issue. The factual agreements on the "test" cases shall only pertain to the "Charter" issue.

Agreed: The parties are to be bound with respect to the "Charter" aspect of the decision resulting from the "test" cases in their respective certification applications. It is understood that this agreement would not preclude any party from seeking judicial review of the Board's decision on the Charter. Moreover, the parties are to be bound *only* with respect to the "Charter" aspect of the Board decision and may raise other issues in their respective certification applications (e.g., timeliness, bargaining unit description, challenges to the list, etc.).

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Agreed: The intervener Inco would not be precluded from leading evidence on its situation (the USWA represents the production unit and the CGA represents the guards). The applicants do not assert that Inco is precluded, by bargaining with the CGA, from raising the s.12 issue....

PROCEDURAL ASPECTS

Scheduling:

Agreed: hearings to be scheduled at a rate of 3 days per week (perhaps 4 on occasion and preferably not Fridays)

Agreed: 40 hearing dates to be set down commencing in September 1989 and continuing each week thereafter except that there is to be a break of approximately one week following the first 36 days of hearing; it is understood that there may be the occasional cancellation for reasons of emergency, illness, etc.

Agreed: if the hearing is not completed within the 40 days, the matter is to continue from day to day thereafter until finished

Agreed: some hearings to be scheduled in Ottawa; specific dates to be determined; counsel to discuss further the number of such dates and which dates would be appropriate to schedule in Ottawa

The Hearing

Agreed: The applicants shall proceed first with respect to evidence re: s. 15 and s. 2(d) of the Charter. The respondents shall lead evidence in response re: s. 15 and s. 2(d) and evidence re: s. 1. The applicants shall then lead reply evidence on s. 15 and s. 2(d) and evidence in response re: s. 1. Finally, the respondents shall lead reply evidence re: s. 1.

Agreed: The respondents shall determine amongst themselves their internal order of proceeding re: leading evidence. The applicants (should more than one counsel appear) shall do likewise.

Agreed: With respect to questions and argument, the order shall proceed as just noted and then in reverse order to end with the counsel who commenced (i.e., "around the table and back"). This order (i.e. permitting questions in the reverse of the initial order) does not preclude a right to object to any specific question asked on the "return" route.

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6. The pre-hearing conference continued on March 10, 1989. Vice-Chair Tacon's Memorandum in respect of that date reads, in part, as follows:

PROCEDURAL ASPECTS

Confirmed: It is confirmed that the following dates have been set for hearing of the above-noted cases:

September 5, 6, 7, 11, 12, 13, 19, 20, 21, 25, 26, 27;
 October 2, 3, 4, 16, 18, 19, 23, 24, 25, 30, 31;
 November 1, 6, 7, 8, 20, 21, 22, 27, 28, 29;
 December 5, 6, 7, 18, 19, 20;
 January of 1990: 2, 3, 4, 8, 9, 10.

Confirmed: It is confirmed that the hearing times for the dates in September and onwards, shall be 9:30 to 12:30, 2:00 to 4:30, except with respect to the first day of each three day block, in which case the hearing times shall be 10:00 to 1:00 and 2.30 to 5:00.

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7. On March 10 the parties' representatives also appeared before this panel of the Board to make submissions on a procedural issue which they had been unable to resolve. The Board's oral ruling concerning that issue is quoted in an unreported decision dated March 20, 1989 (in File No. 1522-88-R), which reads as follows:

1. During the course of the pre-hearing conference proceedings which are being conducted by Vice-Chair Tacon in respect of this application for certification and File Nos. 0068-88-R, 0767-88-R, 1149-88-R, 1484-88-R, 2261-88-R, and 2666-88-R, representatives of the parties agreed to appear before the Board to make submissions on a procedural issue which they had been unable to resolve. On March 10, 1989, after hearing and recessing to consider those submissions, the Board made the following oral ruling:

Having regard to all of the circumstances, including the desirability of achieving the greatest expedition possible in dealing with certification applications, the desirability of avoiding a procedure which may protract hearings by giving rise to the potential for a substantial amount of time being devoted to hearing submissions and making rulings concerning the proper scope of evidence adducible in respect of a bifurcated issue, and the distinct possibility that a significant proportion of the evidence that would be of arguable relevance to the merits of the Charter arguments might also be of arguable relevance to the issues of status or standing, we are unanimously of the view that evidence and argument concerning the issues of status or standing should be heard together with evidence and argument on the merits. Accordingly, the request by some of the respondents that we hear the status or standing issues as preliminary matters is hereby denied.

2. By letter dated March 14, 1989, counsel for Burns International Security Services Limited requested the Board to reconsider that ruling. However, the letter does not contain any representations or submissions that have not already been considered by the Board or that counsel had no opportunity to raise at the aforementioned hearing. Accordingly, the Board, in the exer-

cise of its discretion under section 106(1) of the *Labour Relations Act*, declines to reconsider that ruling.

8. The pre-hearing conference continued again on May 19, 1989. The resulting Memorandum prepared by Vice-Chair Tacon includes the following information:

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4. The parties are to inform the Board well in advance of the September commencement of hearings of the dates to be scheduled for Ottawa so that the necessary arrangements may be made. By agreement, the *September 7 hearing date is to be cancelled*.

5. Agreed: It was agreed that the Inco "configuration" (i.e., employer with guards and an extant collective agreement with the USWA) could be placed before the Board hearing the Charter issue. Inco counsel to inform B. Shell of the evidence to be introduced and this exchange would likely result in at least a partial agreement on facts, thereby expediting the proceedings.

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7. Metro Zoo: H. Doyle stated the Zoo's position that, because of the costs involved, the Zoo wished to withdraw from the Charter litigation and merely await (and be bound by) the Board's decision in that regard. H. Doyle did not wish the Zoo "fact configuration" to be adjudicated by the Board. B. Shell opposed this position. H. Doyle wished to have this issue argued in advance of the September hearing. S. Tacon stated that H. Doyle should indicate his position in writing (reasons and citations, if any) and forward this to the Board. (see recommendation below)

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12. By letter dated June 21, 1989, M. Gordon asserted that the Charter hearing before the Board should be postponed because the question of Board jurisdiction regarding relief for a claimed breach of a Charter right is presently before the Ontario Court of Appeal in *Cuddy Chicks*.

Recommendation

A hearing before the Howe panel be scheduled for July 7, 1989 to hear submissions with respect to two issues:

(a) the motion by H. Doyle that the Metro Zoo be permitted to await the outcome of the Charter issue (and be bound by result) without participating in the Charter hearing and without having evidence re: The Metro Zoo fact configuration before the Board in the Charter hearing;

(b) the motion by (at least) M. Gordon and M. Gleason that the Charter hearing before the Board should be postponed pending the release of the final decision in *Cuddy Chicks*.

9. It is unnecessary for us to deal with the first of those two issues as the Metro Zoo is no longer seeking to withdraw from the Charter hearing. Thus, this decision is confined to the second issue, as were the submissions which counsel made before this panel at the July 7 hearing.

10. Cuddy Chicks Limited is the respondent in a certification application (File No. 0310-87-R) that has been filed with the Board by United Food & Commercial Workers Union, Local 175. In a decision dated May 6, 1988 (*Cuddy Chicks Limited*, [1988] OLRB Rep. May 468) in respect of that application, the majority of another panel of the Board wrote, in part, as follows:

2. The United Food & Commercial Workers International Union, Local 175 ("the union") seeks certification as the exclusive bargaining agent of the employees at the hatchery of Cuddy Chicks Limited ("Cuddy Chicks" or "the employer"). The employer maintains that those employees are persons "employed in agriculture" and are therefore not covered by the *Labour Relations Act* ("the Act") by virtue of section 2(b) of the Act. The union contends, however,

that section 2(b) of the Act is contrary to the *Canadian Charter of Rights and Freedoms* ("the Charter") and that if we find that these employees are employed in agriculture, we should ignore the exemption and proceed with its certification application....

14. For the reasons given in *Spruceleigh Farms, supra*, we find that these employees are employed in agriculture within the meaning of section 2(b) of the Act. Accordingly, we now give our reasons for holding that the Board has jurisdiction to entertain the Charter challenge brought by the union.

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45. Section 52 of the Charter imposes on the Board an obligation to apply the Ontario *Labour Relations Act* in a manner consistent with the requirements of the Charter, as was made clear by the Chief Justice in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at page 353:

If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the *Constitution Act, 1982*, s.52(1), is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect". [emphasis added]

The underlying legal and policy justifications for its assumption of jurisdiction under section 52 from the Board's perspective were set out in *Third Dimension, supra*. We agree that the Board is required to interpret the *Labour Relations Act* in a manner that is consistent with the requirements of the Constitution. In the course of considering applications and complaints before it, the Board must take into account the effect of the Charter, where it is raised by one of the parties before it: *Moore, supra*, *Zwarich, supra*. If we were to refuse to entertain the applicant's Charter application on the ground that, having found these employees to be employed in agriculture, we no longer have jurisdiction over the persons or subject matter before us, we would be remiss in our obligation to ensure that the law we are applying is consistent with the supreme law of Canada.

46. Having considered the case law and the policy reasons advanced by counsel, we continue the approach set out in *Third Dimension, supra*, and the cases following it, of entertaining Charter issues arising in applications and complaints brought under the Act. Given the jurisdiction "to determine all questions of ... law that arise in any matter before it", the Board is required to consider those questions in light of the Charter's constitutional supremacy over all other laws, including the Ontario *Labour Relations Act*. With respect to subsection 24(1), we are satisfied for the reasons given above that the Board constitutes "a court of competent jurisdiction" with respect to matters properly before it. We do not consider this an appropriate case in which the "presumption" (as that term takes its meaning from *Mills, supra*, and *Rahey, supra*) in favour of the forum in which the matter would normally proceed should be displaced: the union's application for certification is properly before us, as are the union and the employer; we have the authority to grant certification, the remedy sought by the union. The employer objects to the application on the basis of section 2(b) of the Act; the validity of section 2(b) has been brought into issue by the union and in our view, we could not lawfully dismiss this application on that basis until we had determined that the agricultural exemption is consistent with the Constitution.

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11. Cuddy Chicks Limited sought judicial review of that decision. In a judgment released on November 2, 1988, Mr. Justice Gray (with whom Austin and McKeown JJ. concurred) held that the Board is a court of competent jurisdiction (within the meaning of section 24(1) of the Charter) in the context of a certification application, that the Board has the authority to apply the Charter in proceedings before it by virtue of section 52(1) of the *Constitution Act*, and that the Board also has jurisdiction to apply the Charter by virtue of its duty to apply statutes to proceedings before it: see *Re Cuddy Chicks Ltd. and Ontario Labour Relations Board et al* (1988), 66 O.R. (2d) 284.

12. On January 16, 1989, Cuddy Chicks Limited obtained leave to appeal that judgment to the Ontario Court of Appeal. The appeal was heard on June 5 and 6, and judgment was reserved.

13. All of the counsel in attendance before this panel of the Board at the July 7 hearing, other than counsel for the applicants and the intervening employees, seek to have the Board postpone the Charter hearing in these proceedings until after the Ontario Court of Appeal has decided the *Cuddy Chicks* appeal. It is their contention that it would be in the interests of justice for the Board to do so because their clients will have been unnecessarily put to substantial expenditures of time and money if it ultimately turns out that the Board has no jurisdiction to deal with Charter issues. They also contend that this case is distinguishable from the usual situation in which a party seeks to adjourn a Board hearing pending disposition of judicial review proceedings in that, in the instant case, the applicants have no right to certification since section 12 of the Act precludes the Board from certifying them. They further contend that considerations of delay defeating labour relations are inapplicable in the context of these proceedings because it was and is open to the applicants to bring the Charter issue directly before the Courts. They further argue that if the applicants had done so, there would have been some procedural advantages available to the other parties, including an opportunity to receive in advance all affidavits filed by the applicants, to cross-examine on them, and to have a costs sanction imposed on the applicants if the case did not succeed. It is also their position that the balance of convenience favours the requested postponement. Some of respondents' counsel also indicated that they wished to reserve their right to request a further postponement in the event that the Ontario Court of Appeal upheld the Divisional Court decision and leave to appeal to the Supreme Court of Canada was subsequently obtained.

14. Counsel for the applicants (and the intervening employees) opposes the requested postponement. In stressing the need to avoid having labour relations defeated through delay, he submitted that the disposition of certification applications covering a substantial number of employees should not be delayed to await a Court decision which may not issue for many months, may never issue at all if the parties to those proceedings resolve their differences, or may not be dispositive of the Board's jurisdiction in the instant proceedings. In support of his clients' position, counsel noted that although the respondents and the intervening union must have been aware of the *Cuddy Chicks* proceedings throughout the pre-hearing conference process, no request was made that the Charter hearing be postponed until months after the aforementioned Charter hearing dates had been set in place through that process. He also noted that if the applicants and intervening employees accept his recommendation that they abandon any reliance on section 15 of the Charter, the number of days needed to hear the Charter issues may be halved, but the remaining need for over twenty days of hearing would still result in substantial delays if the existing dates were cancelled and new dates had to be scheduled following the disposition of the *Cuddy Chicks* appeal. Counsel further indicated that, based upon the hearing arrangements made through the pre-hearing conference process, his clients have retained expert witnesses, including one from the United Kingdom who is not available later in the Fall but who has agreed to come to Toronto to give evidence in these proceedings on September 19, 20, and 21.

15. Having duly considered the able submissions of counsel (which are set forth above in a highly abbreviated form), we are of the view that the requested postponement should be denied. While counsel for some of the respondents described their request in other terms, it is in essence a request for an adjournment, not unlike those which the Board sometimes receives from a party that has applied for (or intends to apply for) judicial review of a Board decision. The Board has a discretion to adjourn any hearing if it considers it advisable in the interests of justice, for such time and to such place and upon such terms as it considers fit (see section 82(1) of the Board's Rules of Procedure; see also section 21 of the *Statutory Powers Procedures Act*, R.S.O. 1980, c. 484). In

exercising this discretion, the Board has adopted a policy which recognizes the great importance of expedition to the efficacious administration of the *Labour Relations Act*. In *Labour Relations Bureau of Ontario General Contractors Association*, [1979] OLRB Rep. Nov. 1036, at paragraph 8, the Board stated:

.... The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

5. The Board policy with respect to adjournments has been capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, ¶170 CLLC 14,024) wherein the Board stated:

.... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness....

The powers of the Board with respect to adjournments were confirmed by the Ontario Divisional Court in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400, at pages 404 and 405:

Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so: see, for example, *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters & Joiners of America, Local Union 2142* (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the *Statutory Powers Procedure Act*, 1971 (Ont.), c.47, and afford the parties the opportunity to be present and be represented, if they wish, by counsel. But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

16. The Courts have made it clear that the Board, as master of its own procedure, is entitled to proceed with the hearing of a matter notwithstanding a pending or anticipated application for judicial review: see, for example, *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183* (1971), 71 CLLC ¶14,087 (Ont. C.A.). This applies all the

more forcefully in the context of an appeal from an unsuccessful application for judicial review of a Board decision pertaining to another application between different parties.

17. The Board and the Courts have long recognized that expedition is particularly important in the context of applications for certification, where labour relations delayed are often labour relations defeated and denied. Moreover, we are not persuaded that such considerations are inapplicable in the context of the instant proceedings. If, as contended by the applicants and the intervening employees, the impugned portion of section 12 is unconstitutional and therefore inoperative as a bar to these applications, the applicants are entitled to have the Board determine with reasonable expedition whether or not they have satisfied the other requirements of the Act and thereby become entitled to be certified. Moreover, the present state of the law in Ontario, as reflected in the aforementioned unanimous Divisional Court judgment in *Cuddy Chicks*, is that the Board is a “court of competent jurisdiction” within the meaning of section 24(1) of the Charter in the context of a certification application, that the Board also has the authority to apply the Charter in proceedings before it by virtue of section 52(1) of the *Constitution Act*, and that, in addition, the Board has jurisdiction to apply the Charter by virtue of its duty to apply statutes to proceedings before it. Thus, the Board has properly been called upon in these proceedings to hear and determine the Charter issues which have arisen in the context of the instant certification applications. In doing so, the Board must conduct a fair and proper hearing in accordance with the requirements of natural justice and the procedures set forth in the *Labour Relations Act* and the *Statutory Powers Procedures Act*. Having exercised their option to have those issues adjudicated in this forum and to thereby avail themselves of those procedures, the applicants acted responsibly in requesting and participating in the aforementioned pre-hearing conference process in an attempt to have the Charter issues decided in the context of “test cases” in which a number of potentially affected parties would be able to participate. That process has resulted in a substantial number of hearing days being set down before this panel in the period from September 5, 1989 to January 10, 1990. The applicants have relied upon those arrangements in preparing their case and scheduling the aforementioned expert witness from the United Kingdom. If those dates are lost through postponement of the Charter hearing, the disposition of these applications will be substantially delayed.

18. We are not insensitive to the expenditures of time and other resources which participation in proceedings of this magnitude entails. However, even if the Ontario Court of Appeal judgment is rendered sometime in the Fall, it may not conclusively determine the issue of the Board’s jurisdiction to hear the Charter issues raised in these proceedings. Moreover, leave to appeal to the Supreme Court of Canada may well be sought and obtained. It would be inappropriate and inconsistent with sound labour relations considerations to postpone the disposition of these applications until that jurisdictional issue has been conclusively resolved by the Courts in the *Cuddy Chicks* case, as that may not occur for years, if at all. The employees to whom these applications pertain should not be placed in limbo for such a lengthy period, uncertain of whether or not the applications will ultimately succeed, and unable to obtain (or, in the context of the Metro Zoo case, change) union representation. Such a delay would certainly not promote the objects of the *Labour Relations Act* as set forth in its preamble.

19. For the foregoing reasons, we hereby deny the requested postponement of the hearing of the aforementioned Charter issues.

CONCURRING DECISION OF BOARD MEMBER W. H. WIGHTMAN; July 25, 1989

While agreeing with the result in this decision, I think it is important to note that counsel for the respondents make a valid point in observing that the matters before this panel are not application(s) for certifications but rather application(s) for reconsideration of earlier findings in the light

of provisions of the *Canadian Charter of Rights and Freedoms*. In the particular circumstance of this case I believe the outcome, in which I join, is correct but other circumstances can be envisioned wherein the distinction drawn to our attention should cause the Board to accede to a request that the Board defer to the courts.

1993-87-JD The International Longshoremen's Association Local 1477, Complainant v. The Canadian Paperworkers Union Local 84 and Quebec and Ontario Paper Company Ltd., Respondents

Jurisdictional Dispute - Complaint by the ILA that the off-loading and movement of waste paper bales from trucks and railcars to the pulp processing system should not have been assigned to the CPU - Introduction of new process impetus for employer to assign to the CPU all of the work - Board directing assignment of work to CPU continue but that CPU accept into its bargaining jurisdiction employees who were working within the bargaining jurisdiction of the ILA

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *M. Eayrs* and *N. Wilson*.

APPEARANCES: *Paul Wintemute, Dominic DiFruscio, Leo Perreault, Sam Lisowsky* and *Robert Smethurst* for the complainant; *J. James Nyman* and *Ron Hartle* for The Canadian Paperworkers Union Local 84; *G. F. Luborsky* and *V. J. Lomore* for Quebec and Ontario Paper Company Ltd.

DECISION OF THE BOARD; July 19, 1989

1. This complaint concerning a work assignment dispute has been made under section 91 of the *Labour Relations Act*. The International Longshoremen's Association Local 1477 (hereafter the "ILA" or the "complainant") alleges that the Quebec and Ontario Paper Company Ltd. (hereafter "the employer") has assigned the work in dispute to employees for whom the Canadian Paperworkers Union Local 84 (hereafter "the CPU") holds bargaining rights instead of to employees represented by the ILA. The work in dispute is the off-loading and the movement of waste paper bales from trucks and railcars to either a "holding" area or directly to a conveyer belt feeding the paper to the pulp processing system. The complainant is claiming all off-loading of the waste paper from trucks and railcars on any shift, whether into the holding area or directly to the conveyer. They are not claiming the loading of the conveyer with waste paper taken from the holding area. Therefore, the complainant is seeking a declaration from the Board that the employer assign to its employees who are represented in collective bargaining by the ILA all off-loading of waste paper from trucks and railcars, whether into a holding area, or directly to the conveyer which feeds the paper to the pulp processing system, excluding loading the conveyer.

2. The employer operates a pulp and paper mill at Thorold, Ontario, which employs approximately 525 to 550 hourly-paid employees represented in collective bargaining by 10 trade unions. There are approximately 18 employees in the bargaining unit represented by the complainant and 300 in the bargaining unit represented by the CPU. The balance of the hourly-paid work force is represented by the other eight trade unions, of which two are other locals of the Canadian Paperworkers Union. The mill produces newsprint on two high speed paper machines installed in 1982. The machines use pulp made up of equal proportions of thermal mechanical pulp and waste paper fibre. The waste paper fibre is made up of twenty-five per cent coated paper and seventy-five

per cent recycled newspaper. The Board will refer to the waste paper fibre as “waste news” for ease of reference, although the Board recognizes that the term “waste news” has a more precise meaning in the industry and does not include coated paper.

3. The employer has produced newsprint at the present site for some seventy-five years and grew from one paper machine to five. It made newsprint primarily from wood pulp. The wood was transported to the mill on ships. It first began using some waste news for producing pulp in the early 1960's. In 1973, the employer stopped receiving pulpwood by ships. Until then, the ILA had the bargaining jurisdiction for employees who unloaded the ships and for employees in the central labour pool at the mill. The central labour pool was the main entry point for all new hires at the mill, except for the maintenance trades. Employees posted from the central labour pool into jobs in the mill departments which usually brought them into the bargaining jurisdiction of the CPU. The ILA and the CPU entered into a work jurisdiction agreement in 1975 by which the ILA would retain jurisdiction over the handling of all wood in the yard and the CPU would take over jurisdiction for the central labour pool. The pool has continued to be the entry point for new hires into the employer's operations.

4. In anticipation of the manpower adjustments which would result from the reduction to two paper machines from five in 1982 and again in 1987 when the changes referred to below were made, the employer executed memoranda of settlement with the trade unions affected. These were referred to as transitional documents. The transitional document respecting the 1982 changes preserved to the ILA the unloading of waste news the way it was being done at the time; that is, into storage. The 1987 transitional document provided for a new classification “de-ink warehouseman”, incorporating into it the waste news material handling functions of lift truck operator (ILA), loader and sorter (CPU).

5. When the two new paper machines came on line in 1982, they were using pulp made from seventy-five per cent wood fibre and twenty-five per cent waste news. Waste news was converted to pulp by a two-step washing process in which the second step removed the ink from the pulp. The employer decided that it could substantially reduce the cost per ton of finished newsprint and improve its competitive position if it increased the waste news pulp component to fifty per cent of the total pulp consumed. Toward that objective, the employer invested thirty million dollars in a new pulp mill for processing waste news and in the necessary modifications to the processing of thermal mechanical pulp. At the same time, the employer stopped using sulphite pulp in the production of newsprint and closed its sulphite pulp mill and its chemical division at the Thorold site as part of the overall change. The new waste news pulp mill uses a floatation de-inking process for removing ink from waste news. It is a continuous process and the process which it replaced was a batch process. The new pulp mill began producing pulp in July, 1987 and the old process was shut down completely by December, 1987.

6. These changes achieved a very substantial reduction in the cost per ton of newsprint produced at the mill. The new floatation process employs the same manpower, 11 employees, but produces approximately five hundred tons of finished pulp per day, approximately double the output of the batch process which it replaced. That was a significant contribution to the reduced cost per ton of the finished newsprint output. This dispute arises because the employer has manned the new waste news processing operation entirely with members of the CPU bargaining unit, whereas the manning of the old process used two members of the ILA's bargaining unit and nine from the CPU. That characterization typifies the dispute but does not describe its whole scope. Its scope is better seen from a brief comparison of the old batch process and the new floatation process.

7. The batch de-inking process produced approximately 250 to 300 tons of finished pulp

per day. It was fed by waste news delivered in highway tractor trailers and railcars. The railcar deliveries were a relatively small part of the total waste news deliveries. Railcars arrived on any shift and day of the week. The bulk of the waste news which arrived by trailer was received at an average rate of 12 to 14 trailers daily, Monday to Saturday. Approximately 90 per cent of this was in the form of baled waste and the remainder was loose. The division of labour between the members of the ILA and the members of the CPU for unloading the waste news and putting it into process was established based on the mutual recognition that, since 1975 at least, the ILA's members were responsible for unloading all materials into storage and the CPU's members were responsible for putting materials into process. For the waste news operation, that translated into the ILA's members having primary responsibility for unloading the waste news into storage and the CPU's members removing it from storage and putting it into the process.

8. More specifically, this worked as follows. Loose waste news was dumped onto the warehouse floor by self unloading trucks. It was taken from there by members of the CPU to the de-inking process. This involved using the bucket of a front-end loader to push the material across the floor to the area in front of the bucket conveyer and then loading it into the conveyer using the bucket of the front-end loader. Sometimes the complainant's members pushed the loose waste news across the floor to the bucket conveyer and occasionally loaded it into the conveyer. The baled stock was unloaded from the trailers and railcars by the complainant's members. Most of the time it was unloaded into storage, but occasionally it was unloaded directly from the trailers to the floor in front of the bucket conveyer. Most of the unloading was done on day shift from Monday to Friday, but there was usually at least one ILA member working on Saturday and available to unload any trailers or railcars that arrived during the day shift hours. The waste news was removed from storage by an employee in the CPU's bargaining unit classified as a loader. The loader used either a clamp lift truck or a fork lift truck for the task. The bales were unloaded onto the floor in front of the bucket conveyer where another member of the CPU's bargaining unit, classified as a sorter, cut the wires holding the bales and checked for and removed any foreign materials. The loader then pushed the waste news into the bucket conveyer using the bucket on a front-end loader or a lift truck. If trailers or railcars of waste news needed to be unloaded on the two off-shifts, the loader usually did the unloading unless a member of the ILA was called in for the work.

9. Waste news is delivered for the floatation process in the same manner as it was delivered for the batch process, but it is unloaded at docks dedicated to the particular mode of delivery. In other words, trailer loads of baled waste news, trailer loads of loose waste news and railcars each have their own dock for unloading. It takes approximately 575 tons of waste news daily to supply the needs of the new process. Waste news deliveries are received primarily on the day shift at the rate of twenty to twenty-five trailers per day. There is no evidence of the number of railcars received. Waste news is unloaded directly into the process whenever possible. Loose waste news is pushed either from the unloading dock, if it is being unloaded directly into the process, or from the loose waste storage area onto the conveyer. A front-end loader is used for this purpose. Baled waste news is either unloaded directly from the trailers or taken from storage and placed on the floor alongside of the conveyer. In either event, whenever seven or eight bales have accumulated on the floor, the wires securing the bales are cut, any foreign material is removed and the waste news is pushed onto the conveyer. The warehouse has the capacity to store 2,500 tons of waste news. In the wintertime, the employer tries to keep a minimum of 800 tons in storage. Since there are no waste news deliveries on Sundays, by Monday morning there is approximately 800 tons of waste news left in storage.

10. Each employee who works in the "de-inking" process is classified as a de-ink warehouseman and is responsible for unloading waste news, whether into storage or into the process, sorting it and loading it onto the conveyer. The de-ink warehouseman does everything previously

done by the ILA members on day shift and the CPU loaders and sorters on all three shifts. The 11 de-ink warehousemen utilized for the new process are deployed at two per shift, three shifts per day, seven days per week. They operate a front-end loader, clamp lift trucks and fork-lift trucks. The inspection of the bales for foreign matter takes approximately ten seconds if the supplier is known and more time and care if the supplier is unknown. The primary function of the de-ink warehousemen is to load the conveyer. It handles approximately five loads per hour, but can hold three loads at any one time. When the conveyer is loaded, the warehousemen unload waste news into storage so that there is an inventory for Sunday when there are no deliveries and for the off-shifts when there are fewer deliveries than day shift.

11. The Board has reviewed and considered the parties' full submissions but will not set them out in any detail. To the extent necessary, the Board will refer to them when it deals with the criteria which it will consider in deciding whether the work in dispute should be assigned to employees represented by the ILA or the CPU. For now, it is sufficient to summarize the principal points of their arguments.

12. Counsel for the ILA submits that the Board's criteria favour neither the ILA nor the CPU. He points out that the ILA has had jurisdiction over the unloading of waste news since 1982 and the introduction of the new floatation process did not warrant the transfer of that jurisdiction to the CPU. This is because there has been no change in the way that waste news is put into process. Counsel maintains that, whether the waste news bales are unloaded into the process from the stock pile or directly from trailers or railcars, it is still necessary to interrupt the unloading process in order for the operator to cut the bale wires and inspect the bales before he can perform the function of loading the waste news onto the conveyer. Furthermore, counsel contends that the unloading of waste news into process from trailers and railcars is not a continuous process as claimed by the employer. The warehousemen unload into warehouse storage as well as into the process because it is necessary to regularly build up the stock pile in order to supply the process demands on the off-shifts, when deliveries are less frequent than on the day shift, and on the weekends. Thus, the stock pile is constantly depleted and restored.

13. Employer counsel argues that it and other employers like it in the pulp and paper industry must be able to achieve maximum efficiency from their investments in new technology because the reduction of trade union fragmentation in the industry has not kept pace with technological improvements. To allow the ILA's claim to the work in dispute would have the effect of prolonging the fragmentation of trade union representation of employees at the mill. It would also have the effect of fragmenting the warehouseman job. What the ILA is seeking to do, counsel contends, is to establish exclusive jurisdiction over the unloading of waste news when they have not previously enjoyed exclusive jurisdiction over that work and do not have a unique claim to the work. The effect of their claim is to seek to prolong the need for lift truck operators in the ILA bargaining unit for unloading waste news when the need for those skills have been eliminated by integrating the three previous functions of unloading from trailers and railcars, unloading from storage and sorting and loading into the process into a single classification. To allow the ILA's claim in those circumstances, counsel argues, would be to allow the ILA to use section 91 of the Act to guarantee the continuation of a classification no longer needed. Counsel points out that the Board has previously stated that section 91 does not guarantee the preservation of any craft. In that respect, counsel relies on the Board's decision in *Joseph Brant Memorial Hospital*, [1981] OLRB Rep. Nov. 1598.

14. Counsel contends further that the off-loading of waste news into the storage is not a discrete function. Rather, it is integrated with the principal task of unloading waste news into process. The CPU has always had jurisdiction over the handling of materials into process and, in the new

floatation process, the off-loading of waste news into stock pile is ancillary to the function of unloading it into process. Counsel submits that at the very least the criteria of collective bargaining relationships, economy and efficiency and employer preference favour the assignment of the work in dispute to members of the CPU. Furthermore, counsel submits, the Board should give greater weight to the criterion economy and efficiency because of the need referred to above for the employer to get the maximum benefit from the capital investment in the new de-inking process and all of the other changes associated with its introduction.

15. CPU counsel asked the Board to consider the context in which this dispute arises as well as the criteria usually looked to in order to resolve work assignment disputes, and to keep that context in mind when it weighs those criteria. The context which counsel points to is the uniqueness in the pulp and paper industry of the ILA's bargaining rights for employees of the employer, acquired as a consequence of the employer having received pulpwood by ship in the past. That practice ended in 1973. Since then, the number of employees represented by the ILA has dwindled to less than 20 and, as a result of the jurisdictional agreement it made with the CPU in 1975, the ILA now represents only the "yard" employees at the employer's mill. On the other hand, since the 1970's the CPU has represented the largest group of employees at the mill. With the conversion from five paper machines to two paper machines, it lost between 200 and 250 employees from its bargaining unit. It is at this time when the CPU has suffered this significant loss of bargaining unit jobs that the ILA seeks not only to maintain its work jurisdiction over the unloading of waste news, but to extend it into unloading waste news into the process, a jurisdiction which historically has belonged to the CPU. The ILA is doing that in spite of the change in the waste news pulping technology, the significant job loss to the CPU and the fact that the ILA's bargaining rights are restricted to the yard.

16. If the Board assesses its usual criteria in that context, counsel submits that the criteria of collective bargaining, employer past practice, employer preference and economy and efficiency all favour the CPU and the criteria of skill and ability and safety favour neither trade union. In addition, counsel maintains, job loss heavily favours the CPU.

17. Counsel for the employer and for the CPU submit that, in all of the circumstances at play in this dispute, the Board should confirm the employer's assignment and issue an order to that effect.

18. Criteria commonly employed by the Board in determining work assignment disputes are collective bargaining relationships, skill and training, safety, economy and efficiency, employer past practice, area practice and employer preference. In the printing industry, the Board has considered also the nature of the work and job loss. See, *Southam Murray Printing*, [1984] OLRB Rep. June 868, paragraph 21. The employer and the CPU have asked the Board to consider those factors as well.

19. The evidence with respect to area practice lacks sufficient specificity to be of any assistance to the Board in this complaint. With respect to the nature of the work, the employer and the CPU were mainly interested in the Board recognizing that the primary task of the de-ink warehousemen is the feeding of waste news into the process and that the task of unloading waste news into storage is secondary to it. The nature of the work in this case is an integral part of two criteria: economy and efficiency and employer preference, and is more appropriately dealt with when considering those criteria than as a separate criterion. With respect to job loss, the Board does not consider it an appropriate criterion in the circumstances of this case. While the Board has considered job loss in the printing industry where the introduction of new technology has caused the loss of jobs, the Board has limited its consideration in such cases to the job loss impact of the discrete

technology change on the disputing trade unions. In this case, the new de-inking process has not resulted in any reduction of the number of jobs directly associated with that process. There were 11 jobs before the change and there are 11 jobs after the change. Counsel for the CPU asks the Board to consider the overall job loss from all of the changes associated with the introduction of the new de-inking process; that is, the closing of the chemical division and the reduction from five paper machines to two paper machines and the modifications to the processing of thermal mechanical pulp. The Board does not consider that to be an appropriate basis for determining the dispute because to do so would be to ignore the earlier history of job loss resulting from technological change; for example, when the employer stopped receiving pulpwood by ship. In this respect see the Board's decision in *Premier Pipelines Limited*, [1988] OLRB Rep. Oct. 1068.

20. In the result, the Board will consider the following criteria in order to determine this work assignment dispute: collective bargaining relationships, skill and training, safety, economy and efficiency, employer past practice and employer preference.

Collective Bargaining Relationships

21. The employer is bound to a common collective agreement with the ILA and the CPU which includes a separate wage schedule for each union. The classification of lift truck operator is common to both wage schedules. The collective agreement gives neither trade union exclusive jurisdiction over the operation of lift trucks. Therefore, the collective agreement itself favours neither trade union. In 1981 the employer and both unions were parties, along with other trade unions at the mill, to a memorandum of agreement (referred to by the parties as a transitional document) which dealt with the realignment of operations at the mill. That document preserved to the ILA the unloading of waste news the way it was being done at the time the agreement was executed; in other words, unloading waste news into storage in the de-inking warehouse. That arrangement favours the ILA. In 1987, as a result of closing the chemical division and making all of the other changes referred to above, the employer, the ILA and the CPU, along with other trade unions at the mill, executed another transitional document. This document establishes the de-ink warehouseman classification and incorporates into that classification the former waste news material handling functions of lift truck operator (the ILA), loader and sorter (the CPU). This factor favours the CPU. In the result, the factor of collective bargaining relationship favours neither trade union.

Skill and Training

22. This factor favours neither trade union. Lift truck operators represented by both of them possess the principal skills essential for the performance of the de-ink warehouseman job. The knowledge required to check bales for foreign matter, if not already possessed by an ILA lift truck operator, could be quickly acquired.

Safety

23. There is nothing in the evidence before the Board that there are any hazards associated with the operation for which the lift truck operators represented by one trade union would be better equipped to handle than those represented by the other, therefore, this factor favours neither trade union.

Economy and Efficiency

24. While doubling of the throughput of waste news with the new process may be attributable largely to the new technology rather than to the integration of the old tasks into the new classification, as argued by ILA counsel, the integration of tasks has made a significant contribution to

the increased efficiency. This is because the waiting time previously associated with each of the individual tasks is eliminated or substantially reduced. For example, when the conveyer is full, the warehousemen unload waste news into stock. If it becomes necessary to wait for a trailer or railcar to be spotted at the unloading bays, the warehousemen can continue to load the conveyer from storage. An additional efficiency is gained from the assignment of the work to members of the CPU because the employer is able to schedule all eleven employees according to the same continuous shift arrangement. Whereas, under the previous manning, the employer had to integrate two ILA day shift employees with the nine continuous shift employees from the CPU bargaining unit. That gives the employer more flexibility in scheduling employees to the operation. This factor clearly favours the assignment of the work to employees of the employer in the bargaining jurisdiction of the CPU.

Employer Past Practice

25. Employer past practice with respect to the batch process favours neither the ILA nor the CPU. While the fact that most of the unloading of waste news was done on day shift by members of the ILA would favour assignment of the work to them, it is clear that all three parties have recognized that the CPU has bargaining jurisdiction over the employees who handle materials into process.

Employer Preference

26. The way the employer has organized the work for the new process is a clear expression of the employers' preference. In the Board's view, there is substance to that preference in the fact that the new arrangement allows the employer to utilize a more flexible and efficient shift schedule and in the fact that the integration of three work tasks into a single classification provides for more efficient execution of the work tasks than the previous division of tasks. This factor favours the present assignment.

27. In summary, the criteria of collective bargaining relationships, skill and training, safety and employer past practice do not favour assignment of the work in dispute to employees of the employer represented by either the ILA or the CPU. The criteria of economy and efficiency and employer preference, however, clearly favour assignment of the disputed work to employees of the employer working within the bargaining jurisdiction of the CPU.

28. There are, however, certain characteristics of this work assignment dispute which are not found in most complaints made under section 91 of the Act which arise out of the competing claims of craft unions. Neither the ILA nor the CPU took the position before the Board that it is a craft union and, without deciding the question, it appears to the Board that neither is. In the history of the employer's operation, until 1975, the ILA had bargaining jurisdiction over the work in which all production employees started their employment with the employer. In the result, employees who had begun employment in jobs where they were represented by, and required under the terms of the collective agreement to be a member of the ILA, eventually ended up working in jobs where they were represented by, and required to be a member of, the CPU. By virtue of the 1975 jurisdictional agreement executed between the ILA and the CPU, the ILA relinquished to the CPU jurisdiction over the central labour pool which is the employment entry point for production employees. Since 1975, therefore, all production employees have begun employment in jobs under the CPU's bargaining jurisdiction. If any employees move from the central labour pool into the yard, they transfer to the ILA's bargaining jurisdiction and are required to be members of the ILA. In spite of the 1975 jurisdiction agreement, however, the parties continued to recognize the ILA as having jurisdiction over the unloading of waste news into storage in the waste news warehouse. That jurisdiction was preserved specifically by the 1981 transitional document. In

the result, employees represented by both unions shared the work in the waste news warehouse on the basis described in the facts of this case. Put another way, neither union had exclusive jurisdiction over all of the work performed in the waste news warehouse prior to the introduction of the floatation de-ink process.

29. No doubt the introduction of the new process was the impetus for the employer to assign exclusively to the CPU's bargaining jurisdiction all of the work in the waste news warehouse. The employer's method of operation in the new process, however, has not changed the fact that there is still substantial unloading of waste news into storage on day shift. Therefore, the effect of the employer's assignment has been to transfer to the CPU's bargaining jurisdiction existing work which the employer and the CPU have recognized previously as falling within the ILA's bargaining jurisdiction. In this circumstance, and having regard to the collective bargaining history referred to in the preceding paragraph, the Board makes the following direction.

30. In this complaint made under section 91 of the *Labour Relations Act* and having regard to the Board's discretion under subsection 1 thereof, the Quebec and Ontario Paper Company Ltd. ("the employer") is directed to continue to assign to its employees working within the bargaining jurisdiction of the Canadian Paperworkers Union Local 84 ("the CPU")

the off-loading and movement of waste paper bales from trucks and railcars to either a "holding" area or directly to a conveyer belt feeding the paper to the pulp processing system.

The employer is directed further to include in that assignment and the CPU is directed to accept into its bargaining jurisdiction employees who were working within the bargaining jurisdiction of the International Longshoremen's Association Local 1477 ("the ILA") as at October 27, 1987, and were so employed on the date hereof, subject to the following conditions:

- (1) they must be qualified lift truck operators;
 - (2) they must have greater mill seniority than employees in the bargaining jurisdiction of the CPU who are qualified to perform the job of de-ink warehouseman;
 - (3) they shall continue to maintain membership in good standing in the ILA; and,
 - (4) they shall not exceed two at any time.
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2864-88-G International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 786, Applicant v. Stone & Webster Canada Limited, Respondent v. The Ontario Erectors Association, Intervener

Construction Industry - Construction Industry Grievance - Collective agreement requiring parties to negotiate where excessive walking time is involved - Board finding that a nine minute walk from the entrance gate to the brass shack was not excessive walking time - Grievance dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *Elizabeth Mitchell* and *Dan Girard* for the applicant; *Mark Contini*, *Jeff Colligan* and *Bob Black* for the respondent; *William Jemison* for the intervener.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND BOARD MEMBER W. N. FRASER: July 14, 1989

1. The applicant has referred to the Board a grievance concerning the interpretation, application, administration and alleged violation of the collective agreement between the Ontario Erectors Association, Incorporated and the Ontario Erectors Association and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council of Ontario ("the provincial I.C.I. collective agreement"). The applicant and the respondent are bound to that provincial I.C.I. collective agreement.

2. The article of the provincial I.C.I. collective agreement which the applicant alleges the respondent has violated is article 4.10 which states as follows:

"On industrial plant projects or construction site projects, the employer and the local union will negotiate an arrangement to transport or compensate employees where excessive walking time is involved."

The applicant asserts that in the circumstances of this case the "excessive walking time" is a nine minute walk from the entrance gate at the Algoma Steel Corporation facilities at Sault Ste. Marie, Ontario, to the "brass shack" of the respondent located at those facilities. Employees are required to report at the commencement and completion of their shift at the brass shack.

3. Stone & Webster Canada Limited ("Stone & Webster") is an employer in the construction industry whose construction activities in the Sault Ste. Marie area are limited to performing construction work for Algoma at its facilities in Sault Ste. Marie. Stone & Webster has provided construction services to Algoma for the past twenty years. During this twenty year period Stone & Webster has never made an allowance (either transportation or compensation) for excessive walking time, nor has the union ever filed a grievance pursuant to article 4.10. Indeed the evidence before us was that the article in dispute has never before been the subject of any grievance involving any of the parties bound to this provincial I.C.I. collective agreement notwithstanding the fact it has been in the collective agreement since 1971. This is therefore a case of first impression.

4. The term "excessive" is a subjective term which can only be given meaning after a review of all the surrounding facts and circumstances. Walking time which is "excessive" in certain circumstances is not necessarily "excessive" in other circumstances. The facts and circumstances which give rise to this grievance and which we must consider and apply in order to give some meaningful definition to this article, (and in particular the word "excessive"), may be summarized as follows.

5. Over the past ten years Stone & Webster has used one of two time-keeping methods in order to record the hours worked by its employees. One such method requires the foreman to record the time of the employees whom the foreman supervises. The other method is known as the "brass shack" method. Under this procedure a brass shack is set up at a construction site. As each employee commences his shift he approaches the brass shack, identifies himself through use of his employee number, and is then given a disc by the clerk at the wicket of the brass shack. This disc has stamped upon it the payroll number of the employee. The clerk at the wicket records the time at which the employee obtained his disc. The employee keeps the disc throughout the day and also may use it to obtain from "stores" any tools or equipment which the employee needs that day. At the completion of his shift the employee returns the disc to the clerk at the brass shack. The clerk records the time at which the disc is returned and in this manner the employees' hours of work are recorded. Stone & Webster employs several different types of tradesmen and the brass shack has a separate wicket for each trade or craft. The method which Stone & Webster uses to record the time worked by its employees is dependent on the number of employees on the construction site. Where there is a relatively small number of employees on site the company uses the method by which foremen record time. If, on the other hand, the construction project is a major project and it is anticipated that the project will require a large number of employees or that there will be a rapid increase in the work force the brass shack procedure is used. The number of employees required before the brass shack procedure is implemented was estimated at being anywhere from 75 to 90 employees. It was the uncontradicted evidence that in the past when the brass shack procedure was used, employees were required to "brass in" at the commencement of their shift at 8:00 a.m. and were required to "brass out" at the end of their shift at 4:30 p.m. regardless of where the brass shack was located.

6. Excluding the brass shack established in January 1989 (which prompted this grievance) in the past ten years Stone & Webster has had three projects at Algoma during which the brass shack procedure was used. In 1979-80 and the early part of 1981 the brass shack procedure was used. The Board heard no evidence about the distance or the length of time required to walk the distance between the entrance to the Algoma site and the location of this brass shack.

7. In 1980-1981 and a portion of 1982 the company again used a brass shack to record the time worked by the employees. At that time the company was involved in construction at the No. 2 Seamless Tube Mill. The access route to the brass shack location for that construction project was 900 metres from the entrance gate and was variously estimated to take approximately 12 or 15 minutes to walk. It was estimated that there were approximately 50 to 75 ironworkers on site during that period. A grievance in respect of the walking time involved at that time and requiring the negotiation of either an arrangement to transport or compensate employees was not filed.

8. In 1985 and 1986, further construction activity at the No. 2 Seamless Tube Mill occurred. On that occasion however a new access route to the brass shack was created as a result of the creation of a new entrance gate (the Goetz gate) and parking lot. Rather than walk along the original access route referred to in paragraph 7, employees could now park their cars near the Goetz gate entrance. The walking distance from that gate to the brass shack was estimated to be 200 to 300 metres. The Goetz gate was opened by Algoma as a result of the large influx of construction employees working at the No. 2 Tube Mill. It was determined that the existing parking facilities were inadequate to accommodate the number of persons employed at the site and therefore Algoma created a new parking lot in the proximity of Goetz Street and opened the new Goetz Gate. Stone & Webster did not ask Algoma to open the gate at Goetz Street.

9. The brass shack procedure was not used again until January 1989. It was the establishment of that brass shack which ultimately led to this grievance. The current brass shack is located

at the end of an access route which is 800 metres from the gate entrance and takes nine minutes to walk.

10. The Board heard evidence of the timekeeping procedures of the employees in the six months preceding the establishment of the brass shack in January 1989. That evidence was tendered by Mr. Paul Martinsen, the union steward on site. In examination-in-chief Mr. Martinsen testified that while working for the respondent at the Algoma facilities he and members of his crew "generally" left at 4:20 rather than 4:30 p.m. because of the distance the employees had to walk to the gates (and thus the location of their car in the parking lots adjacent to those gates). In particular Mr. Martinsen recalled working at the No. 1 Tube Mill, the No. 7 Stock House, the Pig Cast and the Bar and Strip Mill and while working at each of those sites he left at 4:20 rather than 4:30 p.m. While working at the No. 1 Tube Mill employees walk to the fabrication shop on site and from there would be transported to the No. 1 Tube Mill. These various sites within Algoma are situated anywhere from a five minute to a fifteen minute walk from the gates by which persons enter the Algoma facility. Mr. Martinsen testified that he didn't know if other ironworkers on site during this period also left at 4:20 p.m. He indicated however that the composition of the "crews" changed depending on the nature of the job, and on each occasion that he left at 4:20 p.m. the other members of his "crew" also left at 4:20 p.m. There are approximately 5 to 8 persons in a crew. He further testified that, although the foreman of the crew knew the employees left early, (indeed the foreman left with the crew), he did not know whether any member of management above the rank of foreman was aware of this fact. As is typical in the construction industry, the foreman is a member of the union and is covered by the collective agreement.

11. Mr. Martinsen's cross-examination however qualified or modified his evidence in chief. This is not to suggest that Mr. Martinsen was either untruthful or attempting to mislead the Board in any manner. Indeed the opposite is true and the Board found Mr. Martinsen to be an honest and credible witness who gave his evidence in an open, candid and forthright manner. In response to a specific question posed to him in cross-examination as to whether he always left at 4:20 p.m. Mr. Martinsen candidly stated that it was 4:20 p.m. "give or take a few minutes depending on the circumstances." Later when asked whether "generally" also meant give or take a few minutes either way he responded that "most of the time we left later than 20 after". Moreover, in respect of at least two of the jobs about which Mr. Martinsen testified (the No. 7 Stock House job and the Bar and Strip Mill job) the evidence disclosed that the jobs were "extremely dirty jobs." On those occasion the men were "called down" from the job at either 4:10 or 4:15 to permit them time to wash up before the end of shift. The men left after their washup.

12. Counsel for the applicant argued that the nine minute walk from the gate to the brass shack was "excessive", and that the respondent had breached its duty to negotiate as required by Article 4.10. She submitted that the Board had the jurisdiction to remedy this breach of the collective agreement by directing a return to the status quo immediately before the brass shack was implemented (namely to permit employees to end their work day in such a manner so that they would be at the gate at the end of their shift) and by compensating employees in the amount of 10 minutes pay, per day since the filing of the grievance. The respondent and intervener asserted that nine minutes did not constitute "excessive" walking time. It was further submitted that this Board had no jurisdiction to order any remedial relief or to act as an interest arbitrator by making the arrangement to either "transport" or "compensate" for the parties. It was argued that because of the language of the collective agreement the only jurisdiction of the Board was to send the matter back to the parties and direct the parties to negotiate an arrangement to transport or compensate employees.

13. In our view, in the circumstances of this case the nine minute walk from the Algoma

entrance gate to the respondent's brass shack is not excessive. We agree with the submissions of the parties that the term excessive is a subjective term which must be given meaning or definition in the context of the surrounding facts and circumstances. Those facts and circumstances may include, but certainly are not limited to, such diverse factors as the time of year, the weather, the nature of the job, the shift of the employee, the location of the job, the type of terrain over which the employees must walk, whether the employees are the only trade or craft on site or are part of a multi-trade contingent, whether an employees is required to also transport numerous or heavy tools to and from the work site etc. The parties have chosen not to measure walking time by an objective standard such as minutes or distance walked. Other provisions of the collective agreement clearly indicate that the parties could have, if they had so desired, precisely defined the conditions or circumstances under which an accommodation or allowance (either transportation or compensation) would be implemented. Thus for example, the parties in Article 4.9 have specifically agreed to both the amount and the circumstances in which a job condition allowance will be paid to employees working upon a structure which rises more than 200 feet above grade. The job condition allowance in those circumstances is increased as the height of the structure also increases. In view of this provision we infer that the parties have deliberately chosen not to define either what constitutes "excessive walking time" or the allowance or accommodation to be made if there is excessive walking time so as to permit the myriad of surrounding circumstances or conditions to be considered.

14. In the circumstances of this case, in order to give some meaning to this article, we view as particularly significant the previous practice of these parties. The applicant has urged that the previous practice of the parties showed that while working at the No. 2 Seamless Tube Mill in 1985-1986, "accommodation" had been made by the opening of the new Goetz gate. Thus, although employees had originally been required to walk 12 to 15 minutes from the brass shack location to the Algoma entrance gate when working at this job site in 1980-1982, the creation of the new Goetz gate and parking lot significantly reduced the distance and time which employees were required to walk in 1985-1986.

15. Counsel also argued that the previous practice of the parties indicated that in the two-year period preceding the filing of this grievance the respondent had not implemented a brass shack. During that period of time employees had been "compensated" for the walking time involved at the Algoma job sites by being permitted to leave ten minutes early.

16. Finally counsel argued that in our determination we should consider article 4.9 of the collective agreement which deals with the job condition allowance for work on structures rising more than 200 feet above grade. Counsel argued that article was analogous to the article in dispute and should be considered in determining the meaning of "excessive walking time". Counsel submitted that article 4.9 compensates employees for the time spent getting to their job location where that location was 200 feet or more above grade. The job allowance where the location is more than 200 feet but less than 400 feet above grade is \$4.00 per day. The job condition allowance is increased as the height of the structure at which employees are required to report for work becomes greater. Counsel asserted that \$4.00 represents approximately 10 minutes of the journey-men's rate per hour and submitted that as the parties to this collective agreement had acknowledged that employees should be compensated a minimum 10 minutes of pay for time spent going up to a job location, it was reasonable to apply a similar 10 minute standard to walking time.

17. We do not agree with counsel's assertion in this regard. Had the parties intended to compensate or transport employees where the walking time was 10 minutes or more they could simply have said so. That they were able to draft and negotiate language of that nature, or of a

similar nature, is apparent. That they chose not to clearly define walking time in a similar objectively measurable standard is significant.

18. Similarly we do not agree that the opening of the Goetz gate and parking lot could be viewed as an accommodation for, or a recognition of “excessive walking time” by Stone & Webster. The evidence is uncontradicted that the Goetz gate was created by the client Algoma because Algoma foresaw certain problems relating to the logistics of the increased number of persons employed on site. There is no suggestion that the new gate and parking facilities were created by Algoma at the request of Stone & Webster. The evidence does not in any way suggest that Stone & Webster required a new gate because it viewed the original access route to the No. 2 Seamless Tube Mill as too long or the walk as “excessive”.

19. Finally, we do not accept counsel’s characterization that the evidence disclosed a past practice of this employer which permitted employees to leave work 10 minutes early in the two-year period preceding the establishment of the current brass shack. We note first that the *only* evidence was tendered by Mr. Martinsen who was able to testify only in respect of his own experiences while employed by Stone & Webster since June 6, 1988. His experience in that six-month period is insufficient evidence to support the assertion that for the past two years employees have been permitted to leave 10 minutes early. Of more importance however is that even for this six-month period Mr. Martinsen’s evidence was equivocal. In cross-examination he acknowledge that this early departure could be a few minutes either way, and on certain occasions involved special circumstances because of some exceptionally dirty jobs. His evidence also spoke only to the crew with which he worked at any given time. His evidence did not go so far as to establish that it was a common practice for all employees to leave work early, regardless of the circumstances, because of the time required to walk to the gate. In addition we note that although the “practice” of the employees of leaving before the end of their shift was known to the foreman, (a person who acquiesced and participated in that practice) there is no evidence to suggest that those managerial persons outside the bargaining unit knew of, condoned or approved, or agreed to these actions. The evidence does not clearly establish that management by its actions has “amended” those provisions of the collective agreement which require that employees be at their post prepared to work at the commencement of their shift and that they work until the completion of their shift.

20. In our view the past practice of these parties support the assertion that nine minutes is not “excessive walking time”. That past practice indicates that whenever a brass shack was implemented, and regardless of where the brass shack was located on site, employees were required to “brass out” at 4:30 p.m. The respondent has never before provided either transportation or compensation to employees notwithstanding the fact that the location of one of the brass shacks used in the last ten years involved a distance and walking time which exceeds the present. The approximately 900 metres and 12 or 15 minute walk to the brass shack used in 1980-82 during construction at the No. 2 Seamless Tube Mill is both greater in distance and requires more time to walk than the access route to the present brass shack location. Yet in 1980-82 a grievance was not filed. We view that factor as some evidence of how these parties have, over the years and by their own conduct, applied this clause where the brass shack method of recording employees’ time is used.

21. Webster’s Third New International Dictionary (1961) defines excessive *inter alia* as:

“... exceeding the usual, proper or normal ... very large, great or numerous; greater than usual”.

It continues to list as synonyms to the words excessive

“immoderate, inordinate, extravagant, exorbitant, extreme: excessive describes whatever notably exceeds the reasonable, usual, proper, necessary, just or endurable”.

22. In our view the nine minute walk from the brass shack to the gate and parking lot would not, in common parlance be considered as “excessive”. To give that term its ordinary, everyday meaning, or as the term is normally understood the walk does not exceed the “reasonable”, “usual”, or “endurable”. Moreover there is simply no evidence before us to suggest that, in these circumstances, (and as between these parties) the walking time involves a “notable ... departure from the customary.” The evidence is to the contrary. Regardless of whether the brass shack is or is not used, employees of this employer at this site have routinely and customarily walked more than nine minutes without the parties’ negotiation of either transportation or compensation for time walked. There was no evidence to indicate why *this* walking time was considered “excessive”, while the walking time which Mr. Martinsen was required to walk before the implementation of the brass shack (including for example a 10 or 15 minute walk to and from the job at the No. 7 Stock House and the 12 minute walk to and from the Fabrication Shop) and for which a grievance was not filed was not considered excessive. Even if the Board were to accept that on those occasions “accommodation” was made as employees were permitted to leave a maximum of 10 minutes early (and on the evidence we can’t find that such an arrangement was in place or uniformly applied or accepted) we are of the view that the difference to the length of the employees work day between that situation and the present is not excessive as was submitted by the applicant.

23. We therefore find that in the circumstances of this case the walking time is not excessive and dismiss this grievance. In view of the conclusions we have reached we need not address counsel’s argument in respect of our jurisdiction to order specific remedies in the event we determined that the walking time was “excessive”.

DECISION OF BOARD MEMBER J. REDSHAW; July 14, 1989

1. I dissent.
2. I cannot agree with the majority for the following reasons.
 - i) I, too, found Mr. Martinson’s evidence to be credible. He shows a pattern of behaviour by the Ironworkers crews that he worked with, to leave the jobsite to walk to the gate in approximately the same amount of time that it took to walk in to the site in the morning.
 - ii) He also said that when he was required to report to the Fabrication Shop in the morning, he was transported from the shop at starting time to the job site, and transported back to the shop at quitting time by the foreman, to enable him to leave the job shop by 4:20 p.m. to walk to the gate.
 - iii) It was also the uncontradicted evidence of Mr. Martinson that an accommodation was made for the Operating Engineers and Ironworkers working at the Fabarication Shop (a 12-minute walk to the gate) to bring their cars onto the site, eliminating any walking time.
 - iv) The Business Representative, Don Girard, testified that there had been no problem before and that arrangements had been made in the past. This is the only site in the area that he services that uses a brass shack. He also testified that on other job sites in the area employees

were bussed or transported in to the site. On those occasions when walking was required, the employees left the job site at 4:20 p.m.

- v) I found the project superintendent, Mr. J. Colligan, and Mr. B. Black to be something less than credible. For these two senior members of management to suggest that they did not know that the Ironworkers and their Foreman were leaving the site ten minutes (more or less) early for at least a 6-months period is difficult to accept. It is unusual in the extreme for a project superintendent to be unaware of what is taking place on his job site.
- vi) In my own personal experience as a tradesman for fifteen years and a Business Representative for 20 years, and having attended literally hundreds of pre-job conferences (many by members of the Ontario Erectors Association) that the procedure of walking in on your own time and walking out on the employer's time, is a well accepted practice.

3. I would have sent the parties back to negotiate as per Article 4(10).

0142-88-U; 2800-87-U; 0049-88-OH Robert McIntyre, Complainant v. United Steelworkers of America, Local 14045, Respondent v. **Zalev Brothers Limited**, Intervener; Robert McIntyre, Complainant v. United Steelworkers of America, Local 14045, Respondent v. **Zalev Brothers Limited**, Intervener; Robert McIntyre, Applicant v. **Zalev Brothers Limited**, Respondent v. United Steelworkers of America, Intervener

Duty of Fair Representation - Evidence - Health and Safety - Practice and Procedure - Unfair Labour Practice - Complainant fired for engaging in an illegal work stoppage - Discharge upheld by arbitrator - Complainant alleging he brought concern to union prior to arbitration that he was fired because he was the safety representative and that concern was not pursued - Respondent employer arguing that OHSA complaint should be dismissed because the complainant had elected to proceed by way of arbitration - OHSA complaint dismissed - Election made where the discipline of a worker has been litigated at arbitration - Fair representation complaint to proceed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members W. A. Correll and R. Montague.

APPEARANCES: Gary McLister and Robert McIntyre for the complainant; Brian Shell and John Spriggs for the respondent trade union; Jeffrey M. Slopen, Maxwell Zalev and Michelle A. Wylupek for the respondent employer.

DECISION OF THE BOARD; July 6, 1989

1. In its decision dated April 13, 1989, the Board directed the parties to file written submissions as to whether the parties' partial agreement on facts may be relied on in ruling on the preliminary motions in the section 68 complaints and, should the partial agreement on facts be relied

on, to file any written submissions arising therefrom with respect to those preliminary motions. In its decision of May 16, 1989, the partial agreement was set out for the parties' benefit in responding to the Board's direction. Counsel for each of the parties agreed that the Board may rely on the partial agreement on facts in ruling on the preliminary motions in the section 68 complaints.

2. It is useful at this juncture to itemize the preliminary motions. With respect to the section 68 complaints, counsel for the trade union asserted the complaints should be dismissed as not disclosing a *prima facie* case, not being adequately particularized and/or not disclosing a *prima facie* case for the remedy requested. Those preliminary objections initially raised by the respondent company may be characterized for convenience as the "*res judicata*" objection, the "election" objection and the "timeliness" objection. Subsequently, counsel for the company indicated that he was withdrawing the "timeliness" objection as a preliminary matter. Counsel reserved his right to argue timeliness with respect to relief and to cross-examine the complainant with regard to facts asserted by him (the complainant) in connection with the timeliness question as a matter of credibility, should the hearing proceed to the merits. For ease of exposition, the respondent trade union in the section 68 complaints (and the intervener in the OHSA complaint) is referred to as the "union". The respondent in the OHSA complaint (and the intervener in the section 68 complaints) is referred to as the "company". The Board notes that the December 21, 1988 decision inadvertently failed to note the result of an oral ruling by the Board wherein the company was added as intervener in the section 68 complaints. The styles of cause shall be amended accordingly.

3. This decision deals with the preliminary objections of both the trade union in the section 68 complaints and the company in the OHSA complaint. The Board intends to consider first the OHSA complaint. In the Board's view, it is useful to reiterate the partial agreement on facts and the facts assumed true and provable *only* with respect to the preliminary objections in the OHSA complaint.

4. The partial agreement on facts is as follows:

- (a) The complainant was an employee of the company, a member of the union and a health and safety representative.
- (b) The complainant, as health and safety representative, was a member of the health and safety committee and was aware that there was legislation dealing with health and safety. The health and safety committee held meetings attended by the complainant; those meetings dealt with specific health and safety concerns at the company.
- (c) The company operates a metal processing business.
- (d) There was a collective agreement in effect between the company and the union at all material times.
- (e) A work stoppage occurred at the company on July 24, 1986 in respect of which the Board issued an order pursuant to section 92 of the Act and an injunction was obtained naming as defendants, *inter alia*, the complainant.
- (f) The union did not represent the defendant at the Supreme Court of Ontario with respect to the injunction proceedings. Further, the union did not appear in those proceedings, nor was it named in its own right.

- (g) With respect to the section 92 application, the union was also not named in its own right but did appear at the hearing. Initially, the union did not represent those employees named in the section 92 application but, at some point during the proceedings, that changed and the union did represent those employees.
- (h) An injunction was issued on July 28, 1986 in respect of the work stoppage.
- (i) On or about August 5, 1986, the complainant was terminated from his employment, as were other employees. His termination letter was dated July 30, 1986.
- (j) Arbitration hearings before Arbitrator Hinnegan were held on October 21 and 22 and November 5, and 6, 1986. At those hearings, D. Nicholson acted as counsel. Between the date Nicholson was retained and the arbitration hearing, Nicholson had discussions with the grievors. [The parties were not in agreement as to whether Nicholson represented the union at the arbitration hearing or, as asserted by complainant's counsel, directly represented the grievors, although his fees were paid by the union.]

In addition, a number of exhibits had been filed on consent, including the Hinnegan arbitration award released December 19, 1986.

5. The facts asserted by complainant's counsel and assumed true and provable only with respect to OHSA preliminary objections are next set out:

- (a) Nicholson directly represented the grievors, including the complainant, at the arbitration hearings and was not there as the representative of the union. That is, Nicholson was paid by the union to represent the grievors.
- (b) During that period of time (between Nicholson's hiring and the arbitration hearing when Nicholson had discussions with the grievors), the complainant expressed concern that he had been fired not because of the work stoppage but for other reasons, including the fact that he was health and safety representative. That concern was not pursued and the complainant was not advised that there might be an alternative procedure available or that that procedure might give rise to any particular rights or remedy.
- (c) During the complainant's employment and while he was acting as health and safety representative, the complainant did not receive training with respect to health and safety procedures nor did he attend seminars with respect to health and safety complaints. The complainant was not aware of any relevance those procedures may have had.
- (d) Following the release of the arbitration decision, the complainant and the other employees who were discharged had discussions with union representatives with respect to appealing the arbitration deci-

sion, that is, submitting the matter to judicial review. The complainant received information in early 1987 that the union had decided not to proceed to judicial review.

- (e) Subsequent to that union decision, the local union membership at the company signed a petition in which the members expressed their desire to have steps taken to challenge the arbitration decision. That document is not dated.
- (f) Throughout the remainder of 1987, the complaint had discussions from time to time with various representatives of the union to the effect that a challenge to the arbitration decision was still being considered. The complainant frequently called the union concerning that matter.
- (g) In late 1987, the complainant personally became aware of section 89 of the *Labour Relations Act* through reading newspapers and doing research on his own. He contacted the Board by telephone and, two weeks later, received complaint forms which he filled out and submitted (Board File 2800-87-U, filed January 14, 1988). The complainant had also contacted a union representative (R. Chaborek) to get copies of the notes taken at the arbitration hearing and was told they could not be found. Approximately during the same period in late 1987, the complainant became frustrated by the union's inactivity in challenging the arbitration award.
- (h) The original complaint (dated January 14, 1988) was drafted by the complainant on his own while he was still concerned that he had not been successful in obtaining the arbitration notes. The complainant approached legal counsel but first needed to obtain a legal aid certificate, following which he approached present counsel and learned of the possibility of bringing an occupational health and safety action.
- (i) At arbitration, only one issue was submitted to the arbitrator for decision as set out in page 2 of the arbitrator's award. The complainant was not called upon to testify with respect to his beliefs that he was discharged for reasons other than the illegal strike nor was that issue submitted to the arbitrator in any fashion nor with his knowledge. At no time was the complainant called upon to make an election or advised that he had an election to make.
- (j) Following his discharge, the complainant's employment was spotty and he had limited funds. Given the petition (referred to in (e) above), the complainant relied on assurances by the union that matters were being considered which would lead to judicial review or other steps would be taken by the union to protect his interest.

PRELIMINARY OBJECTIONS IN THE OHSA COMPLAINT

- 6. The submissions of counsel are next set out in a highly abbreviated form.
- 7. Counsel for the company contended the OHSA complaint should be dismissed on two

grounds, namely, that the complaint was “*res judicata*” and that the complainant had elected to proceed by way of arbitration rather than before the Board. With respect to the first ground, counsel argued that the appropriateness of the discharge had been challenged and litigated at arbitration and the penalty upheld. It was submitted that the Hinnegan award touched on the health and safety issues in considering the illegal walkout and the Arbitrator had determined, notwithstanding the complainant’s denials, that the complainant was a leader of the illegal work stoppage. Counsel submitted further litigation on essentially the same facts, i.e., the circumstances leading to the termination, was precluded on a “*res judicata*” analysis. Moreover, given the express finding of Arbitrator Hinnegan that the complainant was a leader of the illegal strike, it was inappropriate for the Board to reconsider the matter; indeed, the Board lacked jurisdiction to do so. Cases referred to in this regard were: *Windsor Western Hospital Centre Inc. v. Mordowanec et al.* (1986), 86 CLLC ¶14,051; *Toronto Transit Commission* (1985), 21 L.A.C. (3d) 346. As to the second ground, counsel contended that the complainant, having been represented directly at arbitration by Nicholson (in the complainant’s view), must be taken to have elected to proceed before an arbitrator rather than the Board given that the routes available for redress in section 24(2) of the OHSA are in the alternative. As indicated in the Hinnegan award, the “health and safety” issues were dealt with and, indeed, counsel argued the complainant was content to have his discharge challenged through arbitration until the decision issued upholding the termination. Having had “the matter” of the discipline litigated, it was submitted the Board should not permit the complainant to raise the issue in a different forum. Counsel reviewed the relevant Board jurisprudence and contended the caselaw supported his assertions regarding election: *Reed Limited*, [1978] OLRB Rep. Jan. 1; *Scarborough General Hospital*, [1988] OLRB Rep. Sept. 981.

8. Counsel for the trade union also reviewed the jurisprudence in some detail with respect to the “election” issue, submitting that, while the union had carriage of the grievance, once the grievance proceeds to arbitration, the complainant is deemed to have elected the arbitral route for redress with certain exceptions not applicable herein: *Reed Limited*, *supra*; *Scarborough General Hospital*, *supra*; *Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283 and the cases cited therein. Counsel argued that the “election” analysis in the caselaw reflected a necessary balancing of the various interests involved including the protection conferred on the individual in section 24 of the OHSA, the carriage of the grievance process in the union, the labour relations interests in adjudication of the discipline without duplication of proceedings and the risk of inconsistent decisions. Thus, counsel concurred with the analysis by the company counsel of the election issue and submitted the complaint should be dismissed.

9. Counsel for the complainant submitted that the right of complaint in section 24(2) was that of the employee and the choice of route for redress was also the employee’s. Further, counsel contended that the concept of “choice” required “knowledge” by the employee of the available options and that this “knowledge” constituted a further exception to the circumstances set out in the jurisprudence in which an employee would otherwise be deemed to have opted for arbitration. In the instant case, the complainant did not know of the options and, hence, could not be “deemed” to have chosen the arbitration route. As well, it was argued that “the matter” referred to in section 24(2) was the OHSA issue and, in counsel’s view, the Hinnegan award only dealt with the “illegal strike” issue. With respect to the Hinnegan award, counsel also submitted that the complainant’s testimony that he was not a dissatisfied employee was compatible with a belief at the time that his discharge was because he had raised health and safety concerns. In particular, counsel referred to *Scarborough General Hospital*, *supra*, in support.

10. Counsel for the trade union submitted that the necessary accommodation between the OHSA and the concept of agency implicit in a collective bargaining regime was appropriately reflected in the jurisprudence through the principle of a “deemed election” by the employee of the

arbitration route except in certain circumstances. That is, the choice of arbitration was the “actual” choice of the bargaining agent and must be taken to bind the employee except in those circumstances set out in the jurisprudence and not here relevant. If the bargaining agent failed to inform the employee of the statutory rights under the OHSA and/or the option of proceeding before the Board or arbitration, that might found a section 68 complaint but was not relevant to the options contained in section 24 of the OHSA. To hold otherwise would encourage forum shopping by employees unhappy with the result at arbitration.

11. Company counsel asserted that the complainant had full opportunity to express his concerns as to the purported “real” reasons of his termination at arbitration and had expressed the contrary, as noted in the Hinnegan award. As to the election issue, counsel submitted the caselaw was a necessary elaboration of the permissive wording in section 24(2) and should be followed in the instant case. Finally, it was argued that if the Board heard the OHSA complaint on the merits, found for the complainant and reinstated him, this would fly in the face of the arbitration award which upheld the complainant’s termination because of his leadership role and participation in an illegal walkout. Such a conflict would be neither sensible nor possible given the jurisprudence and the “no-strike” provisions of the *Labour Relations Act*.

12. The Board, then, turns to an examination of the “election” issue and the “*res judicata*” issue assuming true and provable those facts asserted by the complainant’s counsel in paragraph 5 in the context of the agreed statement of facts and the documentary material. That is, the assertions are accepted as true and provable to the extent that they are not contradicted by facts expressly agreed to by the complainant (in paragraph 4) or the documentary material filed on consent.

13. With respect to the “election” issue, the Board considers it useful to set out at this juncture the following passage from *The Municipality of Metropolitan Toronto*, *supra*:

9. Section 24(1) and (2) of the OHSA read:

- 24. (1) No employer or person acting on behalf of an employer shall,
 - (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

10. It is agreed by the parties, at least with respect to the OHSA issues, that section 24(2) of the OHSA requires an election, i.e., that a worker must choose either to proceed before the Board or the arbitration route. The Board concurs that such an election of forum for redress is clear on the wording of section 24(2); see also *Reed Limited*, *supra*; *Inco Metals*, *supra*; *Black & McDonald Ltd.*, [1983] OLRB Rep. Dec. 1971. The Board, however, does not accept the complainant’s assertion that the OHSA issue is severable from the grievance so that the Board could deal with

that issue while the arbitration panel hears the layoff issue. The “matter” referred to in section 24(2) is the alleged violation of 24(1), namely, that an employer acted to penalize a worker, as set out in sub (a) to sub (d), because the worker complied with or sought enforcement of the OHSA. That issue of improper (or unjust) discipline is the “matter” to be heard at arbitration or before the Board. While the respondent asserts that the undisputed fact that the complainant is no longer an active employee is as a result of layoff, there is no doubt that section 24(1) of the OHSA is integral to the grievance should the grievance be adjudicated in an arbitral forum. The grievance form itself refers to “termination without just cause” rather than improper layoff or some such language. Section 24(1) affords workers a right of protection from penalties for invoking the OHSA; that right is enforceable under the legislation either at arbitration or before the Board. The Board also does not accept the complainant’s characterization of the Board as the “expert” forum in respect of alleged violations of section 24(1) of the OHSA. As noted in *Reed Limited, supra*, there can be no general assumptions as to which forum is more suitable. Both are on an equal footing and the statute gives the worker the choice. The Board need not determine precisely whether the remedies available before the Board are broader than at arbitration; rather, the Board regards the remedial authority of either as quite adequate to deal with a violation of section 24(1). Moreover, the Board notes that the Board is *not* the vehicle for enforcing the OHSA beyond the rights in section 24(2). In this regard, the Board comments that the “monitoring” relief requested in item (e) of the complaint would not be appropriate.

11. The Board next deals with the fundamental issue raised in the preliminary motion, namely, at what point does the worker elect his or her forum for resolution of the alleged contravention of section 24(1) of the OHSA. In *Reed Limited, supra*, the Board rejected an assertion that initiation of the grievance process constituted an election. Rather, workers should be encouraged to utilize the grievance process, where such exists, before pursuing the statutory procedure. However, the Board in *Reed* continued, at paragraph 13:

Once it is established, however, that the employee has authorized the union to take the matter beyond the grievance procedure to arbitration, the Board will not deal with any complaint relating to that matter. Whether the employee has chosen arbitration prior to or following the actual filing of the complaint with the Board, the Board will treat the employee as having elected arbitration, and as being bound by that election.

12. The concept of “authorizing” the union to proceed to arbitration was raised in *Inco Metals, supra*, where, although the union indicated initially that the grievance would proceed to arbitration, the grievance was then withdrawn and a complaint filed with the Board. In the circumstances of that case, the Board found that the delay in filing the complaint was not excessive and, further, as there no longer was a “live” grievance ongoing in the grievance procedure, the Board should hear the complaint. Again, though, the Board cautioned:

“as the Board went on to note in *Reed Limited, supra*, however, the employee cannot ride two horses: and once he authorizes the matter to be posted to arbitration, he cannot withdraw that authorization and insist that the matter be filed with the Board instead.” (at paragraph 10).

13. The Board concurs with the reasoning in *Reed Limited, supra*, whereby workers are encouraged to utilize the grievance process, where available, to attempt to resolve the matter before adjudication. Further, the Board agrees with what is essentially a balancing of interests in *Inco Metals, supra*, a recognition that the union has carriage of a grievance but that it is the worker, not the trade union, who is accorded statutory protection under section 24(1) of the OHSA. That is, where a trade union decides *not* to proceed to arbitration, a worker should not thereby be precluded from coming to the Board, at least, in a timely fashion.

14. This Board in this instance need not determine with absolute precision the point at which an election is made pursuant to the statute. In the Board’s view, however, that point is not the initial notification to proceed to arbitration, of itself, but *conduct* by the union in accordance with that notice, conduct such as, the selection of the arbitrator/arbitration panel. Such conduct represents the commitment of the union, as agent for the worker, to the arbitration process, and, therefore, the election of that route for redress. Although the Board recognizes that grievances may be abandoned or settled subsequent to the point noted (indeed, settlement may occur up to

the issuance of an arbitration award), the Board regards the test outlined as appropriate. To permit an "election" at any point prior to the actual *commencement* of an arbitration hearing would not encourage the expeditious resolution of a health and safety complaint. Such expeditious resolution is to be encouraged as a matter of public policy. See also *Tecumseh Products of Canada Limited*, [1985] OLRB Rep. Jan. 123, for the impact of delay on the Board's exercise of discretion to hear an OHSA complaint. Furthermore, depending on the scheduling of the arbitration and Board hearings, there could well be costs involved in cancelling the arbitration date(s), costs which it should be noted the complainant would not bear.

15. The Board would add *two caveats* to the foregoing in recognition of the reality that it is the union, not the individual (with relatively few exceptions in collective agreements), which has carriage of the grievance. Firstly, where a worker objects, in a timely fashion, to the union proceeding to arbitration, and instead comes to the Board for relief, the Board may not hold the worker strictly bound by the subsequent acts of the union with respect to the arbitration process. The circumstances of the case, including the manner and timing of the objection, the delay in filing the complaint with the Board, etc., would be relevant factors in determining whether the Board should hear the complaint. Secondly, should the union, after proceeding down the "arbitration" route, unilaterally settle the grievance, the Board *may* consider it appropriate in some circumstances to permit the worker to come before the Board: see, for example, *Inco.*, *supra*.

16. On the instant facts, however, the union has proceeded, without protest by the complainant, well beyond an initial notice to arbitrate. The union notified the employer of its intention to proceed to arbitration in July 1985. After some delays as a consequence of deciding upon the format for the arbitration, the grievance is now scheduled for hearing for June 11, 1986. The complainant has not objected to the union's carriage of the grievance; indeed, the complainant wants the arbitration to proceed on the "layoff" issue. Moreover, the instant complaint was not filed with the Board until November 18, 1985. In the circumstances, the Board considers that the complainant has made his election under the statute to proceed to arbitration and is now bound by that election. To continue the analogy in *Reed Limited*, *supra*, while a worker may be permitted to ride two horses during the grievance process, he or she will not be permitted to change horses midstream in the arbitration process.

14. The concept of election developed in the jurisprudence just cited (see also *Scarborough General Hospital*, *supra*, and the cases cited therein) reflects the Board's balancing of various interests. While workers should be encouraged to utilize the grievance process, where available, to seek to resolve the matter before adjudication, since arbitration is an equal route for redress under section 24(2) of the OHSA with the Board, duplication of proceedings, with its consequent impact on costs, forum shopping and the potential for conflicting decisions, should be avoided.

15. Counsel for the complainant asserted that "the matter" referred to in section 24(2) of the OHSA was only the "OHSA" issue while the Hinnegan award solely dealt with the "illegal strike" aspect. With respect, that approach was rejected in the *Municipality of Metropolitan Toronto*, *supra*, at paragraph 10, in an analysis with which this Board agrees. The "matter" is the *consequence* for the worker imposed by the employer (as set out in sections 24(1)(a) to (d)), not the reason for the consequence. It is the *reason* for the consequence which is the subject of the adjudication whether before the Board or at arbitration. If the reason is determined to be "because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations", the consequence is prohibited by the OHSA. Whether before the Board or at arbitration, the employer must articulate its "reason" for imposing the "consequence" on the worker and that reason is subject to the appropriate scrutiny.

16. Counsel for the complainant also contended that, for the worker to "choose" the route for redress, the worker had to have actual knowledge of the two options available and this "knowledge" requirement constituted a further exception to the circumstances set out in the jurisprudence wherein a worker would otherwise be deemed to have opted for arbitration. The Board dis-

agrees. It is accurate to note that the right of redress under section 24(2) of the OHSA is the worker's. However, with respect to the representation of the workers in the bargaining unit vis-a-vis the employer, the trade union has exclusive authority (subject to the constraints set out in section 68 of the *Labour Relations Act*). This authority includes (with relatively few exceptions) the carriage of grievances. As noted in paragraph 15 of the *Municipality of Metropolitan Toronto, supra*, the *caveats* to the election principles reflect an accommodation between the institutional rights of the bargaining agent and the statutory protection afforded a worker under section 24 of the OHSA. In the Board's view, the exceptions should be narrowly restricted as the risks of broadening their reach would undermine the very reasons why the election principles were developed, i.e., to avoid duplication of the proceedings with attendant increased costs, forum shopping, and potential for inconsistent decisions. These concerns led to a focus on the *conduct* of the worker and the bargaining agent, in determining the election issue, rather than an examination of the reasons for the decision to select one route or another. Steps taken which are confirmatory of the initial notification to proceed to arbitration (such as selection of the arbitrator, etc.) are *deemed*, subject to the two *caveats*, to constitute an election because to do otherwise would lead to a duplication of proceedings. Where the discipline of the worker has been litigated at arbitration, the "matter" has been dealt with within the meaning of section 24(2) of the OHSA. Whether the worker "knew" at the time of another possible route for redress is irrelevant to the "election" process because that lack of knowledge did not prevent an adjudication of "the matter" in terms of section 24(2) of the Act. The lack of knowledge or, conversely, the quality of the communication between the bargaining agent and the worker (or even the union's conduct at the arbitration hearing) may well ground a section 68 complaint under the *Labour Relations Act* but does not vitiate the choice of forum pursuant to section 24(2) of the OHSA.

17. In the instant case, the termination of the complainant (and others) was litigated before Arbitrator Hinnegan. Because the termination was upheld, the complainant seeks to come before the Board. This is precisely what the election doctrine was developed to avoid. Neither of the *caveats* expressed in the *Metropolitan Toronto* case, *supra*, is applicable. The grievance proceeded to arbitration with the complainant's consent; indeed, on the complainant's view of the facts (see paragraph 5), the complainant was directly represented by counsel at the arbitration hearing. Assuming true and provable the complainant's asserted lack of knowledge of his rights to redress under section 24(2) of the OHSA, that is irrelevant, for the reasons already noted. Assuming true and provable the complainant's assertion he was not called upon to testify with respect to his beliefs that he was discharged for reasons other than the illegal strike may well be relevant to a section 68 complaint but is not relevant to whether the arbitral route had been chosen to challenge the termination. Whether the assertion in paragraph 5(b) that the complainant expressed his concern to Nicholson that the real reason for his discharge was for health and safety reasons is consonant with his testimony in arbitration that he was "not a dissatisfied employee and was happy in all respects with the circumstances of Zalev Brothers" need not be determined by the Board to resolve the election issue. With respect to the assertion in paragraph 5 that only one issue was submitted to the arbitration for decision, it is clear from the face of the arbitration award, that the issue before the Arbitrator was whether the discharge of the complainant (and others) was justified for the reason proffered by the company, that is, their alleged participation in an illegal strike. The Board in the *Metropolitan case, supra*, rejected any bifurcation of the possible reasons for discipline between arbitration and the Board. The Board herein likewise exercises its discretion not to hear the complaint in order to avoid a process whereby the discipline imposed is adjudicated twice, wherein the defence (participation in the illegal strike) may be raised by the company at arbitration in response to an assertion of "unjust discipline" and is litigated, only to have another, more specific, assertion raised subsequently that the discipline was contrary to section 24 of the OHSA. In the Board's view, the complainant, through his bargaining agent and with no objection from the complainant, elected the arbitral route for adjudication of his discharge. In the instant case, the

arbitration process was completed and a decision rendered. Now, the complainant seeks a second adjudication of the reasons for his termination. The instant case most dramatically illustrates the utility of the election doctrine developed by the Board. Section 24(2) of the OHSA provides for the matter to be dealt with by arbitration *or* by the Board. The routes are *alternative*. Quite simply, the complainant has had his termination challenged at arbitration and is not entitled to a second adjudication of this discipline at the Board.

18. Thus, the Board upholds the employer's preliminary objection on the election issue and, accordingly, the OHSA complaint is dismissed. In view of the Board's conclusion, the Board need not deal with the second preliminary motion of the employer that the complaint be dismissed as "*res judicata*".

PRELIMINARY OBJECTIONS IN THE SECTION 68 COMPLAINTS

19. The Board next turns to the preliminary objections raised by the trade union in respect of the section 68 complaint, namely, whether the complaints disclose a *prima facie* case, were adequately particularized and/or disclosed a *prima facie* case for the remedy requested. The union withdrew one preliminary objection that the complaints be dismissed because of the delay in initially filing the complaints and the delay between the initial filings and the hearing. Again, the submissions of counsel are set out in a highly abbreviated form.

20. Counsel for the union reviewed the two section 68 complaints and the documentary material filed in some detail. Counsel asserted that the initial section 68 complaint (the "January 1988" complaint) and the second section 68 complaint (the "April 1988" complaint) did not disclose a *prima facie* case for a breach of the duty of fair representation. In the alternative, to the extent that the allegation that the "real" reason for not proceeding to judicial review constituted a *prima facie* contravention of section 68, it was submitted that the complaint should be dismissed nonetheless as fundamentally defective with respect to particulars or, at the very least, the complainant should be restricted to adducing evidence with respect to the terms of the complaints themselves and should be precluded from amending those complaints in any way. In this regard, counsel stressed the request for particulars made by the union in writing (May 26, 1988) to which the complainant's counsel had not responded to date nor, further, was complainant's counsel undertaking at the hearing to provide the requested particulars. In the further alternative, counsel for the union contended that the complaints did not disclose a *prima facie* case for the remedy requested and, so, should be dismissed on this basis. Counsel emphasized that his submissions were not technical but founded on principles of natural justice whereunder a party is entitled to know the case to be met. In the instant complaints, the particulars were so lacking as to prevent the union from preparing a defence; this prejudice was so great as to warrant dismissal of the complaints without a hearing on the merits or any such hearing must be restricted to matters already in the complaints.

21. Counsel for the company submitted that the two section 68 complaints taken together with the documents filed on consent were sufficient to constitute a *prima facie* case, albeit weak. However, counsel concurred with union counsel that the complaints were defective with respect to particulars. Further, since complainant's counsel had not replied to the union's request for particulars, if the matter proceeded to the merits, the evidence should be restricted to matters actually alleged. To do otherwise and permit the complainant to add a factual foundation at this point would be for the Board to condone an abuse of process.

22. Counsel for the complainant submitted that the union understood the issue in dispute was the propriety of the union's decision not to seek judicial review of Arbitrator Hinnegan's decision and was aware of the material facts. Further, the complainant was not privy to the direct dis-

cussions wherein the union reached its decision but had to rely on those persons who conveyed information to him. Counsel asserted there was no prejudice to the union and that the union was seeking the evidence which the complainant intended to lead rather than particulars. It was contended the union's position was technical and the Board could direct the production of specific particulars to "correct" any problems. Counsel argued that the union's request for particulars was imprecise and the union did not follow up that request. Finally, counsel submitted the complaints disclosed a *prima facie* case and were sufficiently particularized as the complainant need not disclose, for example, the "background" material tending to show the "animus" of the union.

23. The Board must deal with each of the preliminary objections of the union: did the complaints constitute a *prima facie* case and/or a *prima facie* case for the relief requested; are the complaints adequately particularized, especially in view of the union's express request for particulars, so that the complaints should be dismissed outright or, at least, the evidence restricted to the "four corners" of the complaints. Rule 72(1) requires that allegations of wrongdoing be supported by a "concise statement of the material facts, actions and omissions" upon which the complainant intends to rely. Pursuant to Rule 72(4), a person is precluded from adducing evidence at the hearing of any material fact which has not been included in the complaint or document filed except with consent of the Board. Further, in accordance with Rule 71(1), a complaint which does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested may be dismissed without a hearing. In that context, then, the Board examines the January 1988 complaint and the April 1988 complaint.

24. It is useful to set out the text of each complaint at this juncture. The January 1988 complaint, completed by the complainant himself, reads:

On or about Jan/87 the grievor(s) was (were) dealt with by U.S.W.A. Local 14045 - Zalev Unit of the respondent contrary to the provisions of Section 68 of the Labour Relations Act in that he did on his own behalf or on behalf of the respondent: *Act in a arbitrary and discriminatory manner against the vote of Local 14045 - Zalev Unit, executive and membership, to proceed to judicial review of Mr. Hinnegan's award.*

The complaint continues, under "other relevant statements":

1. How could a member of the work force ever expect a fair and impartial hearing from Mr. Hinnegan, given Mr. Hinnegan's inclination to side with the company against working people. His history of awards clearly favours the company. Since the statistics for Ontario Arbitration awards show 50-50 for company and union, one must suspect prejudice.
2. The statement that I was happy and subsequently helped Mr. Hinnegan make a decision against me, seems far fetched. The question of credibility must include something more than a slightly confused answer concerning my happiness that any pollster can find anytime.

25. The April 1988 complaint, which was filed by complainant's counsel states as follows:

- (a) On or about January 1988 the grievor(s) was (were) dealt with by the United Steelworkers of America, Local 14045 of the respondent contrary to the provisions of section(s) 68 of the Labour Relations Act in that he did on his own behalf or on behalf of the respondent:

The Respondent, by its representatives, acted in an arbitrary and discriminating manner and in bad faith. The issue of taking judicial review proceedings from a decision of K. A. Hinnegan, arbitrator, was taken to the membership of the Zalev Unit, and a vote was carried out at which time the vote result was in favour of judicial review. The complainant was fired by Zalev Brothers Limited, which decision was upheld by

the arbitrator. However, it is clear that there are grounds for judicial review of that decision, not the least of which is the arbitrator's previous record of favouring the employer, and his failure to deal with or consider certain facts which could, if they were accepted, result in a different decision.

- (b) The complainant believes that the real reason he was fired by the Company originally and that the Respondent Union has not assisted him, is the fact that at the time he was fired he was the Health and Safety representative and he was actively pursuing health, safety, and environmental issues which the Union leadership felt was endangering a shut down of part or all of the Zalev Brothers Limited operation, thereby occasioning lay offs or lost jobs.
- (c) This is not the first time that the Respondent Union has refused to assist Mr. McIntyre or the other persons that were disciplined at the same time as him. The original problem, according to the discharge documents was an illegal walk out. The Respondent Union, by its representatives refused to provide legal counsel or advise at any time during the subsequent proceedings until it was ordered to do so by the Ontario Labour Relations Board. The Respondent did not provide counsel for a proceeding before His Honour, Judge Kenneth Ouellette for an injunction; it did not provide counsel for proceedings before the Ontario Labour Relations Board, Patricia Hughes, Vice-Chairman. These hearings took place on July 28 and 29, 1986 respectively.
- (d) Since the date of the walk-out the Respondent has not assisted Mr. McIntyre except under order to do so.
- (e) Consequently the complainant contends that the Respondent Union has breached its duty of fair representation by discriminating against the complainant in part because of his actions as the health and safety representative if not totally for this reason, and that in so doing the Respondent has taken part in the imposition of a penalty upon the worker contrary to Section 24(1)(c) of the Occupational Health and Safety Act. The Complainant states that the decision not to intervene to assist him made by Joe Ginty, Business Agent, or the executive of Local 14045, was made on this basis.

[The Board has added the subsection markings for ease of reference.]

26. The complaints were filed in January and April 1988. Counsel for the respondent trade union requested particulars in his letter of May 26, 1988. The Board rejects the submissions of complainant's counsel that the letter of May 26, 1988 requesting particulars was imprecise and should have been followed up by union counsel. That letter clearly requests particulars and expressly puts the complainant on notice of the various preliminary motions which the union intended to raise, including that "the Board limit the evidence strictly to the material facts which have been properly particularized". In the circumstances, especially given the date of the request and the absence of a response by complainant's counsel for over six months, the risk that evidence will be restricted to the material facts which, in the Board's view, have been properly particularized is to be borne by the complainant. That is, in the circumstances and given Rule 72, the Board considers it appropriate, in order to prevent abuse of its process, to preclude the complainant from leading evidence in support of his complaint with respect to matters which have not been particularized already in the complaints themselves.

27. This decision by the Board to restrict the evidence which the complainant may adduce to the "four corners" of the complaint requires a detailed review of the complaints in the context of the documents filed on consent and the agreed facts as set out in paragraph 4. As noted, the parties expressly agreed that the Board could rely on those facts in ruling on the preliminary objections in the section 68 complaints. Again, as mentioned, the facts assumed true and provable in paragraph 5 were expressly restricted to the preliminary objections in the OHSA complaint. The Board, therefore, does not rely on those alleged facts.

28. The gravamen of the January 1988 complaint, also reflected in the April 1988 complaint, is that the union acted in an arbitrary, discriminatory or bad faith manner in its decision not to proceed to judicial review of the Hinnegan arbitration award in the face of a vote of the union membership at the company in favour of judicial review. The text of the complaint indicates the ground for the complaint (Arbitrator Hinnegan's alleged inclination) and notes the issue of the complainant's credibility in the arbitration award. The relief sought is that the union be directed to proceed to judicial review of the Hinnegan decision. In the Board's view, this is sufficient to disclose a *prima facie* breach of section 68 of the Act and a *prima facie* case for the remedy requested. No further particulars are necessary with respect to this ground.

29. The Board next turns to the April 1988 complaint in detail. The section marked (a) discloses a *prima facie* case, on the same basis as noted in paragraph 28. The Board finds that section (b) and the first sentence in section (c) are not sufficiently particularized and the complainant will not be permitted to adduce evidence with respect to those matters. The complainant has not provided the material facts necessary to comply with Rule 72 regarding the alleged conduct of and position taken by the union and its officials. In section (c), the second sentence is not in dispute. It is also agreed that the union did not represent the complainant with respect to the injunction proceeding. With reference to the proceedings before the Board, Patricia Hughes, Vice-Chair, it is agreed that the union, while not named in its own right, did appear at the hearing and at some point during the proceedings did represent the employees (including the complainant). Thus, the alleged fact cannot survive in the face of the agreed fact except in part, i.e., that the union did not provide counsel to represent the complainant during the initial stages of the proceedings before Vice-Chair Hughes. However, the relief sought (judicial review of the arbitration award) does not flow from the alleged breach, even if proved true. Hence, the Board need not deal further with this aspect.

30. Remaining in section (c) is the sentence "The Respondent Union, by its representatives refused to provide legal counsel or advise at any time during the subsequent proceedings until it was ordered to do so by the Ontario Labour Relations Board". To the extent this assertion refers to other than the Hughes proceeding (which the Board has just dealt with), the assertion is not sufficiently particularized to comply with Rule 72. Specifically, the details of the material facts of the alleged misconduct are not pleaded. Thus, the complainant will not be permitted to adduce evidence with respect to such matters. The Board applies the same reasoning and conclusion with regard to section (d).

31. The first sentence in section (e) merely constitutes a bald assertion and is not sufficiently particularized insofar as it refers merely to the "reason" in whole or in part being the complainant's "actions as health and safety representative". The complainant will be precluded from adducing evidence with respect to such matters. To the extent the reference in (e) to the union taking part in the "imposition of a penalty contrary to section 24(1)(c) of the OHSA" refers to a breach by the union of section 68, the same reasoning with regard to absence of particulars applies and the complainant will be precluded from leading evidence with respect to this assertion. Further, the Board notes that a trade union cannot itself breach section 24(1) of the OHSA (except, perhaps, in circumstances in which the trade union is itself an "employer" or "person acting on behalf of the an employer", which is not suggested in the instant case). The last sentence names Joe Ginty as the union official whose decision not to assist the complainant constituted a breach of section 68. To the extent this refers to the decision not to proceed to judicial review, the particular is adequate. Insofar as the sentence refers to other decisions of Ginty's, the matter is not adequately particularized as those decisions (if any) are not identified and evidence will be precluded. The final reference to "on this basis" properly refers back only to what now remains of the complaint.

32. The Board has reviewed the complaints in detail in order to demarcate the limits of the evidence which the complainant will be permitted to lead in support of the allegation that the union breached section 68 in its decision not to proceed to judicial review of the arbitration award. But for the failure of the complainant to properly particularize the allegations and the factual statements expressly agreed to by the parties without limitation, the scope of evidence may well have been broader. However, in the circumstances and for the reasons given, the Board concludes that the evidence must be restricted as indicated above.

33. To recapitulate, the complainant will not be permitted to adduce *evidence* with reference to section (b), section (c), section (d), the first sentence in section (e) and the second sentence of section (e) beyond the decision of the union official Ginty not to proceed to judicial review. It must be stressed that the complainant's counsel is not limited in his *submissions* as to how the facts agreed to, the complainant's evidence with regard to matters properly particularized, the evidence, if any, properly adduced by the other parties and the documentary material warrant a finding that the union contravened section 68 in deciding not to proceed to judicial review of the arbitration award upholding the termination of the complainant (among others).

34. Having regard to the foregoing, the Board directs the Registrar to list the section 68 complaints for hearing in consultation with the parties; the OHSA complaint is dismissed.

COURT PROCEEDINGS

0554-83-U; 0723-86-U (Court File No. A26/89) United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Labourers International Union of North America, Local 183, The Toronto Housing Labour Bureau, Philmor Developments Limited, Mor-Alice Construction Limited, Greenpark Homes, Heron Homes, Bramalea Limited, Victoria Wood Development Corporation Inc., Dellbrook Homes, Michael Reilly, and the Ontario Labour Relations Board, Respondents

Construction Industry - Judicial Review - Practice and Procedure - Unfair Labour Practice - Complaint by Carpenters Union that Labourers Union negotiated collective agreements which contained subcontracting clauses requiring home builders to subcontract work to contractors in contractual relations with Labourers Union notwithstanding that the Union did not represent any of the employees employed by the home builders - Board declining to inquire into complaint due to delay in bringing matter on for hearing - Carpenters Union bringing application for judicial review on the grounds that, *inter alia*, the Board wrongfully declined to exercise its jurisdiction and failed to observe the rules of natural justice in refusing to inquire into the complaint - Judicial review dismissed by Divisional Court - Application by Carpenters Union for leave to appeal to the Court of Appeal dismissed

Board decision found at [1988] OLRB Rep. Feb. 125. Divisional Court decision found at [1989] OLRB Rep. March 315.

Court of Appeal, Morden, Robins and Krever JJ.A., June 26, 1989:

Morden J.A. (endorsement): Motion dismissed with costs except to the O.L.R.B.

1295-85-R (Court File No. 696/89) Hamilton Yellow Cab Limited and Transportation Unlimited Inc., Applicants v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and The Ontario Labour Relations Board, Respondents

Bargaining Unit - Certification - Dependent Contractor - Judicial Review -Stay - Board certifying union for two units of employees of taxi company, one of owner-operators and the other of drivers - Taxi company bringing motion to stay Board decision - Motion dismissed by Supreme Court of Ontario

Board decisions found at [1987] OLRB Rep. Nov. 1373 and [1989] OLRB Rep. Feb. 144.

High Court of Justice, Divisional Court, Austin J., July 10, 1989:

Austin J. (endorsement): This is a motion for a stay. The decision complained of was made Nov. 9/87. No reconsideration was applied for till Nov. 23/88. Reconsideration was given and a decision rendered Feb. 22/89. No application for judicial review was made until July 5/89. Having regard to that chronology, no stay should now be granted. The motion is therefore dismissed with costs.

0277-87-G (Court File No. 857/88) Harbridge & Cross Limited, Applicant v. Ontario Council of the International Brotherhood of Painters and Allied Trades and Ontario Labour Relations Board, Respondents

Bargaining Rights - Construction Industry Grievance - Judicial Review -Whether Painters Union acquired bargaining rights by means of a working agreement signed between the Toronto Building and Construction Trades Council and Harbridge - Harbridge held bound to Painters Union provincial agreement -Breach by Harbridge of sub-contracting clause - Harbridge bringing application for judicial review on the grounds that, *inter alia*, the Board's interpretation of the working agreement was patently unreasonable - Judicial review dismissed by Divisional Court

Board decision found at [1988] OLRB Rep. April 391.

High Court of Justice, Divisional Court, O'Leary, Austin and Yates JJ., July 12, 1989:

O'Leary J. (endorsement): We cannot say that the Board gave either the provisions of the Labour Relations Act or the working agreement a meaning they cannot reasonably bear.

In particular we feel it was open to the Board to conclude that the working agreement gave bargaining rights to the Brotherhood of Painters, that by the provisions of the Labour Relations Act that later came into effect that bargaining rights were taken over by an employees bargaining agent

which negotiated the provincial agreement and that the provincial agreement could not be terminated by notice terminating the working agreement.

The application is therefore dismissed. Cost to the respondents except for the Board.

[Harbridge & Cross Limited is seeking leave to appeal to the Court of Appeal the Divisional Court's decision: Editor]

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2173-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Konvey Construction Company Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2304-87-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Nepean bus Lines Inc. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton employed for not more than 24 hours per week, save and except supervisors, those above the rank of supervisor and office staff" (55 employees in unit)

1409-88-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Levert & Associates Contracting Inc. (Respondent)

Unit: "all employees of the respondent at Smooth Rock Falls, Ontario, save and except office and sales staff, foremen and persons above the rank of foreman" (3 employees in unit)

2218-88-R: Labourers' International Union of North America, Local 1059 (Applicant) v. London Salvage & Trading Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, office and sales staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

2940-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. A. Lamothe Inc. (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2967-88-R: Ontario Public Service Employees Union (Applicant) v. Access Community Services Inc. (Respondent)

Unit #1: "all employees of the respondent in Port Hope and Cobourg, save and except supervisor, persons above the rank of supervisor, office, clerical and administrative staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (46 employees in unit)

Unit #2: “all employees of the respondent in Port Hope and Cobourg regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical and administrative staff” (18 employees in unit)

3202-88-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Keith Holdsworth Consulting Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0014-89-R: International Union, United Plant Guard Workers of America (Applicant) v. Ontario Hydro (Respondent)

Unit #1: “all security guards of the respondent at the site of its Bruce Nuclear Power Development in the County of Bruce, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (70 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all security guards of the respondent at the site of its Bruce Nuclear Power Development in the County of Bruce regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0017-89-R: Service Employees’ International Union, Local 204, affiliated with the S.E.I.U., AFL:CIO:CLC (Applicant) v. Men’s Support Services of York Region (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of York, save and except supervisors, persons above the rank of supervisor, and Secretary to the Executive Director” (30 employees in unit) (*Having regard to the agreement of the parties*)

0110-89-R: United Steelworkers of America (Applicant) v. CombiBoard Ltd. Partnership (Respondent)

Unit: “all employees of the respondent in the Township of Herschel, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and students employed during the school vacation period” (53 employees in unit) (*Having regard to the agreement of the parties*)

0125-89-R: Sheet Metal Workers’ International Association (Applicant) v. Duffy Mechanical Cont. Ltd. (Respondent)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

0153-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Rhucon (1988) Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (38 employees in unit)

0159-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. Ashbury College Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

Unit #2: "all part-time teachers employed by the respondent and its school in the Municipality of Ottawa-Carleton, save and except Director of Junior School and persons above the rank of Director of the Junior School, administrative staff and persons engaged in clerical or support functions" (56 employees in unit) (*Having regard to the agreement of the parties*)

0188-89-R: Service Employees' Union, Local 210 affiliated with Service Employees' International Union, AFL-CIO:CLC (Applicant) v. The Corporation of the Township of Amabel (Respondent)

Unit: "all employees of the respondent in the Township of Amabel regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of April 18, 1989" (3 employees in unit) (*Having regard to the agreement of the parties*)

0204-89-R: Ontario Public School Teachers' Federation (Applicant) v. The Timmins Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the City of Timmins, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (71 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0207-89-R; International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Applicant) v. 727849 Ontario Limited c.o.b. as Viscount Glass & Alluminum (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen and apprentice glaziers and metal mechanics in the employ of the respondent in its Viscount Glass Aluminium Division in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice glaziers and metal mechanics in the employ of the respondent in its Viscount Glass Aluminium Division in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0211-89-R: Niagara Health Care & Service workers Union, Local 302 affiliated with Christian Labour Association of Canada (Applicant) v. Queenchester Terrace (Respondent)

Unit: "all employees of the respondent at St. Catharines, save and except administrator and persons above the rank of administrator" (15 employees in unit) (*Having regard to the agreement of the parties*)

0212-89-R: Canadian Paperworkers Union (Applicant) v. Mel Hall Transport Ltd. and 444024 Ontario Ltd. (Respondents)

Unit: "all employees of the respondent working at and out of the City of Burlington, save and except foremen, persons above the rank of foreman, dispatchers, office, clerical and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

0255-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Peel Condominium Corporation No. 30 (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance at 3533, 3555 and 3577 Derry Road East, in the City of Mississauga, including resident superintendents, save and except property manager, persons above the rank of property manager, office and clerical staff and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

0315-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. 574426 Ontario Ltd. c.o.b. as R & S Plumbing (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0339-89-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Corporation of the Township of Anderson (Respondent)

Unit: "all office and clerical employees of the respondent in the Township of Anderdon, save and except supervisor and person above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

0344-89-R: United Food & Commercial Workers International Union (Applicant) v. Church of St. Peters Children's Day Care Centre (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, save and except supervisor, persons above the rank of supervisor and office and clerical staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

0346-89-R: United Steelworkers of America (Applicant) v. Armstrong World Industries Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

0347-89-R: United Steelworkers of America (Applicant) v. Valco Furniture Ltd. (Respondent)

Unit: "all employees of the respondent in Cornwall, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and students employed during the school vacation period" (91 employees in unit) (*Having regard to the agreement of the parties*)

0351-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Brascan Finish Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0353-89-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 141 (Applicant) v. Trudell Medical (Respondent)

Unit: "all employees of the respondent at its warehouse operations in London, save and except foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0355-89-R: Ontario Nurses' Association (Applicant) v. North Bay & District Health Unit (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity regularly employed for not more

than 24 hours per week by the respondent at and out of the City of North Bay, save and except case managers/assistant supervisors and persons above the rank of case manager/assistant supervisor” (29 employees in unit) (*Having regard to the agreement of the parties*)

0363-89-R: Canadian Union of Public Employees (Applicant) v. Whitby General Hospital (Respondent) v. Group of Employees (Objectors)

Unit: “all office and clerical employees of the respondent in Whitby, save and except supervisors, persons above the rank of supervisor, Secretary to the Executive Director, Secretary to the Assistant Executive Director of Administrative Services, Secretary-Staffing Clerk to the Assistant Executive Director/Patient Services, Secretary to the Director of Human Resources and persons for whom any trade union held bargaining rights as of May 4th, 1989” (33 employees in unit) (*Having regard to the agreement of the parties*)

0380-89-R: Service Employees’ International Union, Local 532 (Applicant) v. S & S Nursing Registry Inc. (Respondent)

Unit: “all employees of the respondent in the City of Hamilton, save and except supervisors and persons above the rank of supervisor” (18 employees in unit) (*Having regard to the agreement of the parties*)

0381-89-R: Ontario Public Service Employees Union (Applicant) v. Moosonee Roman Catholic Separate School Board (Respondent)

Unit: “all employees of the respondent in Moosonee, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

0387-89-R: Service Employees’ Union, Local 183 (Applicant) v. St. Lawrence Steel & Wire Co. (1988) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Township of Hallowell in the County of Prince Edward, save and except forepersons/supervisors, persons above the rank of foreperson/supervisor, office and clerical staff” (21 employees in unit) (*Having regard to the agreement of the parties*)

0388-89-R: International Association of Machinists & Aerospace Workers (Applicant) v. Evergreen Door Inc. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period” (19 employees in unit) (*Having regard to the agreement of the parties*)

0389-89-R: International Association of Machinists & Aerospace Workers (Applicant) v. Dominion Screw Company Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, students employed during the school vacation period and students employed on a co-operative training program” (27 employees in unit) (*Having regard to the agreement of the parties*)

0394-89-R: United Steelworkers of America (Applicant) v. Star Chrome Manufacturing Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (30 employees in unit) (*Having regard to the agreement of the parties*)

0396-89-R: Canadian Union of Public Employees (Applicant) v. Marriott Corporation of Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at Trent University in Peterborough, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per

week and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

0397-89-R: Canadian Union of Public Employees (Applicant) v. 538414 Ontario Ltd. o/a Harrowood Seniors Community (Respondent)

Unit: “all employees of the respondent in the Town of Harrow, save and except supervisors, persons above the rank of supervisor, and the secretary to the administrator” (40 employees in unit) (*Having regard to the agreement of the parties*)

0398-89-R: Canadian Union of Public Employees (Applicant) v. Bruce-Grey County Roman Catholic Separate School Board (Respondent)

Unit: “all office, clerical and technical employees of the respondent in Bruce-Grey Counties, save and except supervisors, persons above the rank of supervisor, secretary to payroll supervisor, secretary to superintendent of business, secretaries to superintendent of education, secretary to director of education and employees in bargaining units for which any trade union held bargaining rights as of May 9, 1989” (44 employees in unit) (*Having regard to the agreement of the parties*)

0420-89-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Carleton Board of Education (Respondent) v. Craig Sherman and Helen Elder-Anderson (Objectors)

Unit: “all employees employed as Special Education Teacher Assistants by the respondent in the Regional Municipality of Ottawa-Carleton, save and except the Manager of Educational Services - Special Services, persons above the rank of Manager of Educational Services - Special Services, office, clerical, custodial and maintenance staff, professional services personnel, and persons regularly employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of May 12, 1989” (141 employees in unit) (*Having regard to the agreement of the parties*)

0424-89-R: International Alliance of Theatrical Stage Employees & Motion Picture Machine Operators of the United States & Canada, Theatrical Wardrobe Union, Toronto Local 58 (Applicant) v. The Canadian Stage Corporation, c.o.b. under the firm name and style of The Canadian Stage Company (Respondent)

Unit: “all stage employees employed by the respondent at the Toronto Free Theatre, 26 Berkley Street in the Municipality of Metropolitan Toronto, save and except stage managers and persons above the rank of stage manager” (3 employees in unit) (*Having regard to the agreement of the parties*)

0439-89-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Applicant) v. 137215 Canada Inc. (Respondent)

Unit: “all employees of the respondent in Glengarry County, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (31 employees in unit) (*Having regard to the agreement of the parties*)

0456-89-R: Service Employees’ Union, Local 210, affiliated with Service Employees’ International Union, AFL:CIO:CLC (Applicant) v. The Salvation Army Men’s Social Services Centre (Respondent)

Unit: “all employees of the respondent at the Men’s Social Services Centre in the City of Windsor regularly employed for not more than 24 hours per week save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

0483-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Girardin Corporation (Respondent)

Unit: “all employees of the respondent at Cambridge, save and except supervisors, those above the rank of supervisor, plant engineer, research and development technician, office and sales staff” (39 employees in unit) (*Having regard to the agreement of the parties*)

0494-89-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Premier Cleaning Contractors of Canada Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Ingersoll, save and except supervisors, those above the rank of supervisor, office and clerical staff" (23 employees in unit) (*Having regard to the agreement of the parties*)

0519-89-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Lanwell Property Management Ltd. c.o.b. as St. Charles Village (Respondent)

Unit #1: "all employees of the respondent in the City of Welland, save and except registered and graduate nurses, office and clerical staff, security personnel, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Welland employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, office and clerical staff, security personnel, supervisors and persons above the rank of supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

0520-89-R: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. C & G Pine & Oak Shop (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0538-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Nipissing Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the District of Nipissing, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in *The School Boards and Teachers Collective Negotiations Act*" (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0557-89-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the Townships of Anson, Hindon & Mindon c.o.b. as Haliburton County Ambulance Service (Respondent)

Unit: "all employees of the respondent in the County of Haliburton, save and except supervisors and persons above the rank of supervisor" (16 employees in unit) (*Having regard to the agreement of the parties*)

0563-89-R: Service Employees' International Union, Local 204, Affiliated with the SEIU, A.F. of L., C.I.O., C.L.C. (Applicant) v. Women's Habitat of Etobicoke (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

0575-89-R: Canadian Paperworkers Union (Applicant) v. National Forest Products Canada Inc. (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office and sales staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

0585-89-R: Graphic Communications International Union, Local 466 (Applicant) v. A & E Screen Printing (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

0587-89-R: Service Employees Union, Local 183 (Applicant) v. 692536 Ontario Ltd. c.o.b. as Carewell Applefest Retirement Lodge (Respondent)

Unit #1: "all employees of the respondent in the Town of Brighton, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the Town of Brighton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

0645-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. International Masonry (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2638-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 880 (Applicant) v. The Butcher Engineering Enterprises Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (41 employees in unit)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	10

3151-88-R: Canadian Union of Public Employees (Applicant) v. Halton Hills Hydro-Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all office employees of the respondent in the Town of Halton Hills, save and except supervisor, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons employed on a government sponsored work program" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	1

3152-88-R: Canadian Union of Public Employees (Applicant) v. Halton Hills Hydro-Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees of the respondent in the Town of Halton Hills, save and except non-working foreperson, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and persons employed on a government sponsored work program" (22 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	3

3216-88-R: International Union of Operating Engineers, Local 796 (Applicant) v. The Credit Valley Hospital (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all stationery engineers and maintenance employees of the respondent located in engineering services save and except the chief engineer/supervisors, persons above the rank of chief engineer/supervisor, persons employed under the bio-medical engineering program, persons employed under the Fire and Security Program, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener	0

0149-89-R: Ontario Public School Teachers' Federation (Applicant) v. The Norfolk Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the Regional Municipality of Haldimand-Norfolk, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (109 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	109
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0112-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Mancor Can. Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Oakville, save and except foremen, persons above the rank of foreman, office, technical and sales staff" (182 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	182
Number of persons who cast ballots	171
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	88
Number of ballots marked against applicant	82

Applications for Certification Dismissed Without Vote

0302-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Amarcord Carpenters

Ltd. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (formerly Local 1190) (Intervener) (12 employees in unit)

2434-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Intervener) (4 employees in unit)

3041-88-R: United Food & Commercial Workers International Union (Applicant) v. M.G.I. Packers Inc. (Respondent) v. Group of Employees (Objectors) (40 employees in unit)

0076-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 599 (Applicant) v. Dolvin Mechanical Contractors Ltd. (Respondent) (4 employees in unit)

0100-89-R: International Brotherhood of Electrical Workers, Local 530 (Applicant) v. Herter-Neill Construction Ltd. (Respondent) (4 employees in unit)

0150-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Halton Board of Education (Respondent) (491 employees in unit)

0187-89-R: Employees Association of Rochester Township (Applicant) v. The Corporation of the Township of Rochester (Respondent) (10 employees in unit)

0372-89-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. Kitchener-Waterloo Hospital (Respondent) (216 employees in unit)

0515-89-R: Ontario English Catholic Teachers' Association (Applicant) v. Lambton County Roman Catholic Separate School Board (Respondent) (131 employees in unit)

0540-89-R: Association des enseignantes et des enseignants suppléants d'Ottawa-Carleton élémentaire séparé 2i (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent) v. Le Conseil scolaire de langue française d'Ottawa-Carleton (Intervener) (167 employees in unit)

0648-89-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Windsor Arms Hotel Ltd. (Respondent) v. Canadian Textile & Chemical Union (Intervener) (71 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3115-88-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Vaughan Hydro-Electric Commission (Respondent) v. Canadian Union of Public Employees and its Local 2246 (Intervener)

Unit: "all employees of the respondent in the Town of Vaughan save and except general manager, general manager's secretary, operations manager, operations secretary, financial officer, accountant, construction superintendent, service superintendent, consumer service superintendent, forepersons, engineering associates, designers, technologists and supervisors, administration secretary, information secretary, engineering secretary, students employed during the school vacation period, students employed on a cooperative training program and temporary employees whose terms of employment does not exceed 130 days per year or whose terms of employment are part of a government subsidized work program" (100 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	103
Number of persons who cast ballots	93
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	79

3170-88-R: United Food & Commercial Workers International Union, AFL:CIO:CLC (Applicant) v. Ascolectric Ltd. c.o.b. as Alcom (Respondent)

Unit: "all employees of the respondent in the City of Port Colborne, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff and students employed during the school vacation period" (44 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	44
Number of persons who cast ballots	43
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	31

0033-89-R: Ontario Public Service Employees Union (Applicant) v. Renascent Fellowship Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent employed in the Municipality of Metropolitan Toronto and the Town of Whitby, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	33
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	18

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2354-87-R: United Food & Commercial Workers International Union (Applicant) v. Coca-Cola Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Kingston and Belleville, save and except supervisors, persons above the rank of supervisor and office staff" (37 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	32
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	21

3184-88-R: International Brotherhood of Electrical Workers, Local 2228 (Applicant) v. Sterling Place Ltd. Partnership c.o.b. as Sterling Place (Respondent)

Unit: "all employees of the respondent at Sterling Place Retirement Home in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses employed in a nursing capacity, office and clerical staff, persons regularly employed for not more than 24 hours per week" (38 employees in unit)

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	12

0001-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Cuddy Food Products Ltd. and Cuddy International Corporation c.o.b. as a partnership in the name of Cuddy Food Products (Respondent) v. United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Intervener)

Unit: "all employees of Cuddy Food Products Ltd., 10 Cuddy Boulevard, London, Ontario, save and except supervisors, persons above the rank of supervisor, nurses, office and sales staff, students in the school vacation period, and persons regularly employed for not more than 24 hours per week" (633 employees in unit)

Number of names of persons on revised voters' list	629
Number of persons who cast ballots	509
Number of spoiled ballots	16
Number of ballots marked in favour of applicant	203
Number of ballots marked in favour of intervener	287
Ballots segregated and not counted	1

0005-89-R: Graphic Communications International Union, Local 500M (Applicant) v. RBW Graphics, a Division of Southam Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Owen Sound, save and except department managers, persons above the rank of department manager, office, clerical and sales staff, students employed during the school vacation period and students employed in cooperative training programs, and persons regularly employed for not more than 24 hours per week" (427 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	427
Number of persons who cast ballots	398
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	396
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	141
Number of ballots marked against applicant	253
Ballots segregated and not counted	2

0159-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. Ashbury College Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all teachers employed by the respondent and its school in the Municipality of Ottawa-Carleton, save and except Director of the Junior School, persons above the rank of Director of the Junior School, the Chaplin, part-time teachers, administrative staff and persons engaged in clerical or support functions" (56 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	51
Number of persons who cast ballots	51
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	26

Unit #2: (see *Bargaining Agents Certified Without Vote*)

0171-89-R: United Steelworkers of America (Applicant) v. Arcor P.V.C. Windows Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Stoney Creek, save and except forepersons, persons above the rank of foreperson, office, sales and clerical staff" (26 employees in unit)

Number of names of persons on list as originally prepared by employer	25
Number of persons who cast ballots	24
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	20

0174-89-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Blue Bell Canada Inc. (Respondent) v. Group of Employees (Intervener)

Unit: "all employees of the respondent in the Town of Renfrew, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, truck drivers, mechanics, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (158 employees in unit)

Number of names of persons on list as originally prepared by employer	159
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Number of persons who cast ballots	148
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	109

0192-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Belleville Truck Centre Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Sidney, save and except foremen, persons above the rank of foreman, sales, office, and clerical staff and students employed during the school vacation period" (20 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	13

Applications for Certification Withdrawn

1556-86-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Miller Paving Ltd. (Respondent) v. Labourers' International Union of North America, Local 607, Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

0537-88-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada, Local 58, Toronto (Applicant) v. Multi-Tech Services Inc. (Respondent) v. Group of Employees (Objectors)

0094-89-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Ainsworth Glass & Mirror, A Division of Ainsworth Developments Ltd. (Respondent) v. Group of Employees (Objectors)

0208-89-R: International Brotherhood of Painters & Allied Trades, Local 200 Ottawa, (Applicant) v. 727849 Ontario Ltd. c.o.b. as Viscount Glass & Aluminum (Respondent) v. Group of Employees (Objectors)

0286-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Redg Construction Ltd. (Respondent)

0362-89-R: Canadian Union of Public Employees (Applicant) v. The Governing Council of the University of Toronto (Respondent)

0443-89-R: Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Central Park Lodges, Windsor, Ontario (Respondent)

0464-89-R: Ironworkers District Council of Ontario (Applicant) v. M D R a Division of 619138 Ont. Inc. (Respondent)

0480-89-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Nicholls Radtke Ltd. and Union Gas Ltd. (Respondents)

0485-89-R: United Steelworkers of America (Applicant) v. Vulcan Electric Seal Company Ltd. (Respondent)

0495-89-R: Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Windsor Western Hospital Centre (Respondent)

0509-89-R, 0513-89-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. P&M Electric (1982) Ltd., and Northland Electric (Ont.) Ltd. (Respondents)

0556-89-R: Ontario Association of Shelter Workers (Applicant) v. Project Hostel (Respondent)

0586-89-R: Canadian Union of Public Employees (Applicant) v. Helen Henderson Care Centre (Respondent)

0588-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. ICG Liquid Gas Ltd. (Respondent)

0712-89-R, 0713-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Concrete Systems and/or 799316 Ontario Inc. (Respondent)

0767-89-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pre-Eng Contracting Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0467-89-FC: United Steelworkers of America (Applicant) v. The Daily Press, Division of Thomson Newspapers Company Ltd. (Respondent) (*Dismissed*)

0612-89-FC: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Lau Division - Philips Air Distribution Ltd. (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0626-86-R: United Food & Commercial Workers Union, Locals 206 & 486 Chartered by the United Food & Commercial Workers International Union (Applicant) v. Combined Merchandisers Inc. and Loblaw's Supermarkets Ltd. (Respondents) v. United Food & Commercial Workers International Union, Local 1000A (Intervener) (*Withdrawn*)

1607-88-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Davis Electrical Contracting Ltd., Sunset Electrical Contracting (539822 Ontario Inc. c.o.b. as), 761723 Ontario Inc. c.o.b. as Merrick Mechanical (Respondent) (*Withdrawn*)

1967-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ain & Zakuta Ltd. and Ain & Zakuta (Canada) Inc. (Respondent) (*Granted*)

2309-88-R: Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tacher Enterprises Ltd., J D Builders & John David Bayes (Respondents) (*Withdrawn*)

2699-88-R: Peter Bernhardt & James Kinney (Applicants) v. The Corporation of the City of Kitchener and The Centre In The Square Inc. (Respondents) (*Withdrawn*)

2738-88-R: Labourers' International Union of North America, Ontario Provincial District Council and Local 527 and its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1981 & 1089 (Applicants) v. New Look Restoration (Ottawa) Ltd., New Look Restoration (Kitchener) Ltd., and Empire Restoration Inc. (Respondents) (*Withdrawn*)

0244-89-R: Canadian Paperworkers Union (Applicant) v. Mel Hall Transport Ltd. and 444024 Ontario Ltd. (Respondents) (*Granted*)

0281-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Traugott Construction (Kitchener) Ltd. and Tanurb Developments Inc. (Respondents) (*Withdrawn*)

0337-89-R, 0140-89-R: Millworkers, Local 802 - United Brotherhood of Carpenters and Joiners of America (Applicant) v. Heymes Wood Products Ltd. (Respondent) (*Withdrawn*)

SALE OF A BUSINESS

0625-86-R: United Food & Commercial Workers Union, Locals 206 & 486 Chartered by the United Food & Commercial Workers International Union (Applicant) v. Combined Merchandisers Inc. (Respondent) v. United Food & Commercial Workers International Union, Local 1000A (Intervener) (*Withdrawn*)

1607-88-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Davis Electrical Contracting Ltd., Sunset Electrical Contracting (539822 Ontario Inc. c.o.b. as), 761723 Ontario Inc. c.o.b. as Merrick Mechanical (Respondent) (*Withdrawn*)

1966-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ain & Zakuta Ltd. and Ain & Zakuta (Canada) Inc. (Respondents) (*Granted*)

2309-88-R: Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tacher Enterprises Ltd., J D Builders & John David Bayes (Respondents) (*Withdrawn*)

2738-88-R: Labourers' International Union of North America, Ontario Provincial District Council and Local 527 and its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1981 & 1089 (Applicants) v. New Look Restoration (Ottawa) Ltd., New Look Restoration (Kitchener) Ltd., and Empire Restoration Inc. (Respondents) (*Withdrawn*)

0516-89-R: Canadian Union of Public Employees and its Local 2487-01 (Applicant) v. 749527 Ontario Ltd. o/a Manitoulin Ambulance Service (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2471-88-R: Jeffrey Welsh (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 1030 (Respondent) v. Morewood Industries Ltd. (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

2679-88-R: Robert Vaillancourt (Applicant) v. Service Employees Union, Local 183 Formerly Local 219 (Respondent) v. Wymering Manor Ltd. (Intervener) (*Withdrawn*)

2740-88-R: Steve Martin (Applicant) v. Brewery, Malt & Soft Drink Workers, Local 304 (Respondent) v. S & H Fabricating of Canada Inc. (Intervener)

Unit: "all employees of S & H Fabricating Canada Inc. in Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	14
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	13

0118-89-R: Parkmount Hotel (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (5 employees in unit) (*Granted*)

0219-89-R: Alvena Desserre (Applicant) v. United Food & Commercial Workers Union, Local 175 (Respondent) v. Kowality Motor Inn (Intervener) (5 employees in unit) (*Dismissed*)

0253-89-R: Murray Beliak (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Brandy lane Homes Inc. (Intervener) v. Group of Employees (Objectors) (4 employees in unit) (*Dismissed*)

0273-89-R: G. Halcovitch Carpentry Ltd. (Applicant) v. Carpenters District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local Union 27 (Respondent) v. Group of Employees (Objectors) (2 employees in unit) (*Dismissed*)

0304-89-R: Linda Goodchild, Joyce Letourneau, Danielle Picard, Lee-Anna Tessier (Applicants) v. United Food & Commercial Workers International Union, Local 175, CLC:AFL:CIO: "Union" (Respondent) v. 537670 Ontario Ltd. c.o.b. as Journey's End Motel (Intervener) (7 employees in unit) (*Dismissed*)

0314-89-R: Jacinta Marcial (Applicant) v. Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener) (8 employees in unit) (*Granted*)

0370-89-R: Shawna Doyle (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. A Circle of Children (Intervener) v. Group of Employees (Objectors) (9 employees in unit) (*Granted*)

0400-89-R: Michael Lahosky (Applicant) v. Retail, Wholesale & Department Store Union, Local 440 (Respondent) v. Ambertex Inc. (Intervener) (14 employees in unit) (*Granted*)

0434-89-R: Sean Kane (Applicant) v. Teamsters, Local 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Sony of Canada Ltd. (Intervener) (25 employees in unit) (*Granted*)

0438-89-R: Laurie Munro (Applicant) v. The Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener) (8 employees in unit) (*Granted*)

0472-89-R: Maria C. Aprile (Applicant) v. The Union of Bank Employees, Local 2104 (Respondent) v. National Trust (Intervener) (3 employees in unit) (*Granted*)

0477-89-R: Helen Margaret Smith (Applicant) v. Service Employees Union, Local 183 (Respondent) v. Bruce Hooper Food Services Ltd. (Intervener) (14 employees in unit) (*Granted*)

0492-89-R: Evelyn McNamara (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 399 (Respondent) v. Brimac Anodizing (1985) Ltd. (Intervener) (2 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0269-89-U: The Art Gallery of Ontario (Applicant) v. Ontario Public Service Employees Union, Ontario Public Service Employees Union, Local 535, Ted Loughead, Ed Gorley, Ruth Jones, Carla Roth, Karen Hefferman, Sharon McGill, Elizabeth Khera, Michael Douglas, Mary Greta, Kerry Kim, Catherine Spence, Jill Cate, Gisela Navia, Bud Johnston, Clair Hargitay (Respondents) (*Dismissed*)

0558-89-U: Johnson Controls Ltd. (Applicant) v. Russell St. Eloi, Sean O'Ryan, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, and its Locals 628, 508, 800, 552, 663, 593, 527, 666, 67, 599, 46, 221, 463, 71 & 819, Carol Smith & Henry Severeide (Respondents) (*Dismissed*)

0614-89-U: Lomar Mechanical Corporation Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800, Mike Zangari and Ron Laforest (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0466-89-U: PCL Constructors Eastern Inc. (Applicant) v. Labourers' International Union of North America, Local 183, International Union of Bricklayers & Allied Craftsmen, Local 2, International Brotherhood of Electrical Workers, Local 353, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 and Leslie Hanecak, John Robbins, John Zanussi and Vince McNeil (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0181-87-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Saco Fisheries Ltd. (Respondent) (*Dismissed*)

1634-87-U: International Woodworkers of America (Complainant) v. Atway Transport Inc. (Respondent) (*Dismissed*)

1885-87-U: Marsha Kriss (Complainant) v. Metro (Works Dept.) C.U.P.E., Local 79, Jim Neiman (Local 79 Lawyer) (Respondents) (*Withdrawn*)

2305-87-U: Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Nepean Bus Lines Inc. (Respondent) v. Dave Loney (Objector) (*Granted*)

0474-88-U: International Union of Operating Engineers, Local 865 (Complainant) v. Canadian Pacific Forest Products Ltd. (Respondent) (*Granted*)

1352-88-U: Labourers' International Union of North America, Local 506 (Applicant) v. Grant Construction (Respondent) (*Withdrawn*)

1891-88-U: Clinton Patterson (Complainant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Withdrawn*)

2129-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. VDO Yazaki (Respondent) (*Dismissed*)

2278-88-U: George La Plante et al (Complainants) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Unicell Ltd. (Intervener) (*Dismissed*)

2441-88-U: United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Complainant) v. Morewood Industries Ltd. and Messrs. Roy Mills, William Grassam & Larry Marcellus (Respondents) (*Withdrawn*)

2555-88-U: Andrzej Pietkiewicz (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1967 (Respondent) v. McDonnell Douglas Canada Ltd. (Intervener) (*Withdrawn*)

2574-88-U: Bruce Johnston Johnston Rigging & Electrics Inc. (Complainant) v. Ticketing Holdings Inc., New Century Productions Inc., Stephen F. McKernan, Michael J. McKernan, Greg McKernan, Terry Crack (Respondents) (*Withdrawn*)

2591-88-U: Boysie S. Powell (Complainant) v. Sonco Steel Tube Ltd., United Steelworkers of America, Local #7536 (Respondents) (*Dismissed*)

2659-88-U: Teamsters, Local 1247 Chemical, Energy & Allied Workers (Complainant) v. Victory Soya Mills (Respondent) (*Dismissed*)

2671-88-U: United Brotherhood of Carpenters & Joiners of America, Local 1030 (Complainant) v. Jeffrey Welsh & Valerie Cameron (Respondents) v. Morewood Industries Ltd. (Intervener) (*Withdrawn*)

2707-88-U: Labourers' International Union of North America, Local 1059 (Complainant) v. London Salvage & Trading Company Ltd. (Respondent) (*Withdrawn*)

2754-88-U: Graphic Communications International Union, Local 500M (Complainant) v. Paragon Industrial Photographic Reproductions Ltd. (Respondent) (*Withdrawn*)

2840-88-U: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Complainant) v. B.J. Normand Ltd. and Maurice Langevin (Respondents) (*Withdrawn*)

2863-88-U: Hotel Employees & Restaurant Employees Union, Local 604 (Complainant) v. 564002 Ontario Ltd., c.o.b. as Trent Inn Hotel (Respondent) (*Withdrawn*)

2873-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Barmish Inc. (Respondent) (*Withdrawn*)

2885-88-U, 2886-88-U, 2887-88-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Canada Dry Bottling Company Ltd. (Respondent) (*Withdrawn*)

2946-88-U: Bakery, Confectionery & Tobacco Workers' International Union, Local 325-T (Complainant) v. Rothmans, Benson & Hedges Inc. (Respondent) (*Withdrawn*)

3011-88-U: Stamatis Stathis (Complainant) v. Canadian Automobile Workers, Local 195 (Respondent) v. Fabricated Steel Products (Windsor) Ltd. (Intervener) (*Dismissed*)

3034-88-U: Edelmiro Vidal (Complainant) v. Retail, Wholesale & Department Store Union, Local 414 and The Great Atlantic & Pacific Company Ltd. (Respondents) (*Dismissed*)

3191-88-U: Teamsters, Local 938 (Complainant) v. Freightmaster Ltd. (Respondent) (*Withdrawn*)

3209-88-U: Ethier Sand & Gravel Ltd. (Complainant) v. Greater Northern Ontario Trucking Association (Respondent) (*Withdrawn*)

0054-89-U: Canadian Union of Public Employees and its Local 65 (Complainant) v. Corporation of the Town of Fort Frances (Respondent) (*Withdrawn*)

0104-89-U: United Paperworkers International Union (Complainant) v. Niagara Paper Co. Ltd. (Respondent) (*Withdrawn*)

0143-89-U: Randy Russell (Complainant) v. Canadian Union of Public Employees, Ron Moreau & Tim Edwards (Respondents) v. Sault Ste. Marie Board of Education (Intervener) (*Withdrawn*)

0179-89-U: Conrad Lubitz (Complainant) v. United Food & Commercial Workers International Union (UFCW, Local 175) & Warren Kennedy Acting Bus. Representative & A. & P. Foodstores (Respondents) v. United Food & Commercial Workers Union, Local 175 (Intervener) (*Withdrawn*)

0183-89-U: Conrad Lubitz (Complainant) v. United Food & Commercial Workers International Union (UFCW) Local 175 & Warren Kennedy Acting Bus. Representative (Respondents) v. United Food & Commercial Workers Union, Local 175 & Warren Kennedy (Intervener) (*Withdrawn*)

0197-89-U: Ontario Nurses' Association (Complainant) v. Brodie Nursing Homes Ltd. (Respondent) (*Withdrawn*)

0200-89-U: Kingston Independent Nylon Workers Union (Complainant) v. Dupont Canada Inc. (Respondent) (*Withdrawn*)

0224-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Co-ops Cabs (Associated Toronto Taxi Cab Co-operative Ltd.) (Respondent) (*Withdrawn*)

0243-89-U: Ontario Nurses' Association (Complainant) v. James Bay General Hospital (Respondent) (*Withdrawn*)

0247-89-U: Bertrand F. Bennett (Complainant) v. United Brewers Warehousing Provincial Board (Trade Union) (Respondent) v. Brewers Retail Inc. (Intervener) (*Withdrawn*)

0251-89-U: Ted Laczko (Complainant) v. R.J. Simpson's Mfg. Co. and C.A.W., Local #1738 (Respondents) (*Withdrawn*)

0267-89-U: United Brotherhood of Carpenters & Joiners of America, Local 802 (Complainant) v. Pasqualotto Woodcraft (Respondent) (*Withdrawn*)

0270-89-U: The Art Gallery of Ontario (Complainant) v. Ontario Public Service Employees Union, Ontario Public Service Employees Union, Local 535, Ted Loughead, Ed Gorley, Ruth Jones, Carla Roth, Karen Hefernan, Sharon McGill, Elizabeth Khera, Michael Douglas, Mary Greta, Kerry Kim, Catherine Spence, Jill Cate, Gisela Navia, Bud Johnston, Clairra Hargitay, (Respondents) (*Withdrawn*)

0282-89-U: Jim Brown (Complainant) v. R.J. Simpson's & Union, Local 1738 (Respondents) (*Withdrawn*)

0299-89-U: Teamsters, Local No. 879 (Complainant) v. Niagara Employment Agency Inc. (Respondent) (*Withdrawn*)

0306-89-U: Brian Grace (Complainant) v. United Electrical, Radio & Machine Workers of Canada (UE) and its Local 550 (Respondent) (*Withdrawn*)

0317-89-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. L. J. Vandenberg (Respondent) (*Withdrawn*)

0336-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Beatrice Foods Inc. (Respondent) (*Withdrawn*)

0357-89-U: International Brotherhood of Painters & Allied Trades, Local 200 Ottawa (Complainant) v. 727849 Ontario Ltd., c.o.b. Viscount Glass & Aluminum (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

0365-89-U: Doug Como (Complainant) v. U.A.W., Local 251 (Respondent) (*Withdrawn*)

0366-89-U: Ida Brady (Complainant) v. Canadian Union of Public Employees, Local 1263 (Respondent) (*Withdrawn*)

0382-89-U: Office & Professional Employees International Union (Complainant) v. Centennial Credit Union Ltd. (Respondent) (*Withdrawn*)

0383-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Panther Security & Investigation Ltd. (Respondent) (*Withdrawn*)

0401-89-U: Laura Poole (Complainant) v. John Weatherup (Respondent) (*Withdrawn*)

0414-89-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. 763998 Ontario Inc. c.o.b. as Mann's Emma Foods (Respondent) (*Withdrawn*)

0417-89-U: Mr. Wilfred L. Labreche (Complainant) v. North Bay & District Association for the Mentally Retarded (Respondent) (*Withdrawn*)

0418-89-U: Ontario Public Service Employees Union (Complainant) v. North Bay & District Association for the Mentally Retarded (Respondent) (*Withdrawn*)

0436-89-U: International Association of Machinists & Aerospace Workers, District Lodge 717 (Complainant) v. Evergreen Door Inc. (Respondent) (*Withdrawn*)

0449-89-U: Lever Brothers Ltd. (Complainant) v. Teamsters, Local 132, I.B. of TCW & H. of A.; Canadian Conference of Teamsters Chemical Energy & Allied Workers Division of I.B. of TCW & H. of A.; Canadian Conference of Teamsters, I.B. of TCW & H of A; Guy Viggers (Respondents) (*Withdrawn*)

0453-88-U: International Brotherhood of Electrical Workers, Local 804 (Complainant) v. H. Fluker Consultants Inc. c.o.b. as Fluker Electrical-Mechanical Contractors (Respondents) (*Withdrawn*)

0458-89-U: United Food & Commercial Workers International Union, AFL:CIO:CLC (Complainant) v. St. Peter's Children's Day Care Centre (Respondent) (*Withdrawn*)

0479-89-U: Service Employees' International Union, Local 204 (Complainant) v. Brantwood Residential Development Centre (Respondent) (*Withdrawn*)

0491-89-U: Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 280 (Complainant) v. Northfield Metal Products Ltd. (Respondent) (*Withdrawn*)

0500-89-U: M. G. Johre (Complainant) v. International Brotherhood of Electrical Workers, Local 120, Bev DuMaresq, Bill Arnezeder & Malcolm Bennett (Respondents) (*Dismissed*)

0506-89-U: Rocco Gallizzi (Complainant) v. CUPE, Local 3096 (Respondent) (*Withdrawn*)

0525-89-U: Service Employees' Union, Local 183 (Complainant) v. Cal-Tex Ltd. (Respondent) (*Withdrawn*)

0532-89-U: Robert D. Cole (Complainant) v. Canada Haircloth Employees Assoc. (Respondent) (*Dismissed*)

0583-89-U: Malcolm J. MacNeil (Complainant) v. A. G. Simpson's Plant Council (Respondent) (*Withdrawn*)

0613-89-U: Ontario Public Service Employees Union (Complainant) v. Ontario Council of Regents for the Colleges of Applied Arts & Technology (Respondent) (*Withdrawn*)

0615-89-U: Rudolph McPherson (Complainant) v. Design Craft (Respondent) (*Withdrawn*)

0630-89-U: Bibi Hussein (Complainant) v. Bank of Commerce (Respondent) (*Dismissed*)

0705-89-U: Jose Eduardo Terceira (Complainant) v. Manuel Fioza (MCF) (Respondent) (*Dismissed*)

0719-89-U: Nancy Lynn Glover (Complainant) v. OPSEU Union (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2225-88-M: Ruth H. Larmour (Applicant) v. Ontario Nurses' Association (Respondent Trade Union) v. The Carleton Place & District Memorial Hospital (Respondent Employer) (*Dismissed*)

0233-89-M: Elsie Nelson (Applicant) v. Service Employees International Union (Respondent Trade Union) v. Canadian Red Cross Society (Respondent Employer) (*Withdrawn*)

0237-89-M: Dana M. Colarusso (Applicant) v. Canadian Union of Educational Workers, Local 2 (Respondent Trade Union) v. Department of English University of Toronto (Respondent Employer) (*Dismissed*)

FINANCIAL STATEMENT

2645-88-M: Walter A. Kelly (Complainant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

1285-88-JD: Lumber & Sawmill Workers' Union, Local, 2995 (Applicant) v. Canadian Paperworkes Union, Local 89, and Spruce Falls Power & Paper Company Ltd. (Respondents) (*Dismissed*)

1698-88-JD: Four Seasons Drywall Systems & Acoustics Ltd. (Complainant) v. Labourers' International Union of North America, Local 506 and Drywall Acoustic Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Respondents) (*Dismissed*)

1738-88-JD: Commonwealth Construction Company, a Division of Guy F. Atkinson Holdings Ltd. (Complainant) v. Labourers' International Union of North America, Local 1036, and International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Respondents) (*Withdrawn*)

1767-88-JD: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Complainant) v. Calorific Construction Ltd. and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 593 (Respondents) v. Millwright District Council on behalf of itself and its Local 1592 (Intervener) (*Withdrawn*)

0562-89-U: International Beverage Disensers' & Bartenders' Union, Local 280 of the Hotel & Restaurant Employees' & Bartenders International Union (Complainant) v. Hotel, Restaurant & Cafeteria Employees' Union, Local 75 (Respondent) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2143-87-M: Ontario Nurses' Association (Applicant) v. Whitby General Hospital (Respondent) (*Granted*)

0617-88-M: Public Service Alliance of Canada (Applicant) v. Alliance Employees' Union (Respondent) (*Granted*)

1821-88-M: BMG Music Canada Inc. (Applicant) v. BMG Employees Association (Respondent) (*Dismissed*)

2185-88-M: City of Timmins (Applicant) v. C.U.P.E. (Respondent) (*Withdrawn*)

2758-88-M: The Board of Education for the City of Toronto (Applicant) v. The Association of Toronto Secondary School Secretaries (Respondent) (*Withdrawn*)

2956-88-M: Canadian Union of Public Employees, Local 1880 (Applicant) v. Children's Aid Society of Algoma (Respondent) (*Withdrawn*)

3223-88-M: Canadian Union of Public Employees, Local 217 (Applicant) v. The London Regional Art Gallery & Museum (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3042-88-OH: Dave Howden (Complainant) v. Waferboard Corporation Ltd. (Respondent) (*Withdrawn*)

3134-88-OH: John M. Bowman (Complainant) v. Steelcase Canada Ltd. (Respondent) (*Withdrawn*)

0340-89-OH: Doug Bridge (Complainant) v. Al Duccan, Amsen Assoc. Ltd. (Respondent) (*Withdrawn*)

0402-89-OH: Brian Gregory Wild (Complainant) v. Paron Metal Fabricating (Respondent) (*Withdrawn*)

0533-89-OH: Ms. Kim O'Bireck (Complainant) v. Ontario March of Dimes, Niagara Region (Respondent) (*Withdrawn*)

0571-89-OH: Stacey Angus (Complainant) v. Val Breitenstein (Respondent) (*Withdrawn*)

0593-89-OH: Everette Chapelle (Complainant) v. The Toronto Transportation Commission (Wheel Trans Division) (Respondent) (*Withdrawn*)

0701-89-OH: Maurice Hamelin (Complainant) v. R. E. Dumouchelle & Sons; Brian Dumouchelle (Respondents) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1024-88-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Commonwealth Construction Company Ltd. (Respondent) (*Withdrawn*)

1529-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ain & Zakuta (Canada) Inc. (Respondent) (*Granted*)

1680-88-G, 1681-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Tesc Contracting (Respondent) (*Withdrawn*)

1769-88-G: Labourers' International Union of North America, Local 527 (Applicant) v. Olympia & York Developments Ltd. (Respondent) (*Withdrawn*)

2233-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. D'Angelo Construction & Engineering Ltd. (Respondent) (*Withdrawn*)

2300-88-G: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Howard Avery Construction Ltd. (Respondent) (*Granted*)

2357-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Alstate Drywall Systems Ltd. (Respondent) (*Withdrawn*)

2381-88-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. M. & M. Brothers Contracting Ltd. (Respondent) (*Withdrawn*)

2409-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E. S. Fox Ltd. (Respondent) (*Dismissed*)

2466-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Vaughan Masonry Inc. (Respondent) (*Withdrawn*)

2627-88-G: The Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Major Painting Ltd. (Respondent) (*Granted*)

2731-88-G, 2732-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Delsan Contracting Ltd. (Respondent) (*Withdrawn*)

2913-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. B. J. Normand Ltd. (Respondent) (*Withdrawn*)

2987-88-G: Marble, Tile & Terrazzo, Local 31 (Applicant) v. Noranda Tile Co. Ltd. (Respondent) (*Granted*)

3053-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. B & G Refrigeration (Respondent) (*Withdrawn*)

3054-88-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. G. D. Perrier Carpentry (Respondent) (*Withdrawn*)

0084-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Traugott Construction (Kitchener) Ltd. (Respondent) (*Withdrawn*)

0086-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Ltd. (Respondent) (*Withdrawn*)

0202-88-G: International Brotherhood of Painters & Allied Trades, Ontario Allied Construction Trades Council (Applicants) v. Ontario Hydro & Electrical Power Systems Construction Association (Respondents) (*Dismissed*)

0203-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Sil-Mor Carpentry (Respondent) (*Granted*)

0231-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Captain Developments Ltd. (Respondent) (*Withdrawn*)

0248-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Gargaro & Sons Carpentry Ltd. (Respondent) (*Withdrawn*)

0399-89-G: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Oakdale Dry-wall & Acoustics (Respondent) (*Granted*)

0428-89-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Palazzi Bros. Tile & Carpet Ltd. (Respondent) (*Granted*)

0478-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Pyramid Dry-wall & Acoustics Ltd. (Respondent) (*Granted*)

0482-89-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Granted*)

0487-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Leo Alarie & Sons Ltd. (Respondent) (*Withdrawn*)

0488-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Dielco Industrial Contracting Ltd. (Respondent) (*Withdrawn*)

0489-89-G: Labourers' International Union of North America, Local 1059 and Ontario Allied Construction Trades Council (Applicants) v. The Electrical Power Systems Construction Association, Ontario Hydro & Rimfire Construction (Respondents) (*Granted*)

0507-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bramalea Ltd. (Respondent) (*Withdrawn*)

0518-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 560792 Ontario Ltd. o/a Canada Framing (Respondent) (*Granted*)

0523-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. B.J. Normand Ltd. (Respondent) (*Withdrawn*)

0527-89-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Prestressed Systems Inc. (Respondent) (*Withdrawn*)

0535-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Canmec Mechanical Contractors Ltd. (Respondent) (*Granted*)

0552-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. L-K Interior Contracting Ltd. (Respondent) (*Granted*)

0554-89-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Niagara Air Systems (Respondent) (*Withdrawn*)

0573-89-G: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Lewin Kingston Mechanical Contractors (Respondent) (*Granted*)

0581-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. V. K. Mason Construction Ltd. (Respondent) (*Withdrawn*)

0606-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Della Port Drywall Ltd. (Respondent) (*Withdrawn*)

0625-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. McCall Contractors Inc. (Respondent) (*Withdrawn*)

0627-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. K. D. Acoustics (Respondent) (*Granted*)

0628-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Helm Interiors (Respondent) (*Withdrawn*)

0677-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Brunswick Drywall Ltd. (Respondent) (*Withdrawn*)

0681-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Top Commercial Concrete Form (Respondent) (*Withdrawn*)

0682-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mississauga Construction Ltd. (Respondent) (*Withdrawn*)

0688-89-G: Labourers' International Union of North America, Local 506 (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

0690-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Delta Door & Electrical Systems (Respondent) (*Withdrawn*)

0706-89-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081 (Applicant) v. Ellis Don Ltd. (Respondent) (*Dismissed*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1321-88-U, 1430-88-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Todd Ramsay Interiors & James R. Todd (Respondents) (*Dismissed*)

3220-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. B. Maskell Ltd. (Respondent) (*Dismissed*)

0500-89-U: M. G. Johre (Complainant) v. International Brotherhood of Electrical Workers, Local 120, Bev DuMaresq, Bill Arnezeder & Malcolm Bennett (Respondents) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

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ONTARIO LABOUR RELATIONS BOARD REPORTS

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ONTARIO LABOUR RELATIONS BOARD

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1989] OLRB REP. AUGUST

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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Employee Reference - Employee - Parties - Applicant individual requesting a determination as to the employee status of another individual - No “question” as to employee status arising between the parties - Procedure under s.106(2) not available to the applicant - Application dismissed

CHATELAINE VILLA NURSING HOME; RE TRACY CASTELLAN

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Parties - Employee - Employee Reference - Applicant individual requesting a determination as to the employee status of another individual - No "question" as to employee status arising between the parties - Procedure under s.106(2) not available to the applicant - Application dismissed

CHATELAINE VILLA NURSING HOME; RE TRACY CASTELLAN

827

Parties - Evidence - Petition - Termination - Union relying on the labour relations environment in the workplace in attacking the voluntariness of the petition to terminate the union's bargaining rights - Board hearing evidence but finding it of no relevance - Labour relations background only of relevance in an exceptional case where there is a pattern of notorious illegal anti-union conduct by employer - Whether an employee in one unit can apply to terminate union's bargaining rights in two other units - Board finding that applicant having status to bring applications - Votes ordered

THOROLD I.G.A. MARKET; RE SANDRA TAYLOR; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES; RE U.F.C.W., LOCAL 633

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TACTIX CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 903

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ONTARIO LEGAL AID PLAN, THE, UNDER THE ADMINISTRATION OF THE LAW SOCIETY OF UPPER CANADA & COMMUNITY LEGAL EDUCATION ONTARIO; RE O.P.S.E.U.; RE THE ONTARIO ASSOCIATION OF LEGAL CLINICS ("OALC") AND YORK COMMUNITY; RE COMMUNITY LEGAL EDUCATION ONTARIO, THE ONTARIO LEGAL AID PLAN UNDER THE ADMINISTRATION OF THE LAW SOCIETY OF UPPER CANADA AND ROSS IRWIN; RE TENANT HOTLINE INC.; RE NEIGHBOURHOOD LEGAL SERVICES; RE INJURED WORKERS' CONSULTANTS..... 862

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PINKERTON'S OF CANADA LTD.; RE O.L.R.B., RICHARD BIBEAU, C.G.A., NATIONAL PROTECTIVE SERVICES COMPANY LIMITED, THE BOARD OF MANAGEMENT FOR THE METROPOLITAN TORONTO ZOO, BURNS INTERNATIONAL SECURITY SERVICES LIMITED, GORDON A. SOUTHO, WACKENHUT OF CANADA LIMITED, SHANE FREEMAN, U.S.W.A., LARRY BISHOP, INCO LIMITED, INTERNATIONAL UNION UNITED PLANT GUARD WORKERS OF AMERICA.....

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THOROLD I.G.A. MARKET; RE SANDRA TAYLOR; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES; RE U.F.C.W., LOCAL 633

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Timeliness - Religious Exemption - Religious exemption application untimely - Applicant arguing that the timeliness restriction conflicted with the *Ontario Human Rights Code* - Code not prevailing over *Labour Relations Act* - Application dismissed

TORONTO, DEPARTMENT OF ENGLISH UNIVERSITY OF; RE DANA M. COLARUSSO; RE C.U.E.W., LOCAL 2.....

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Trade Union - Certification - Whether six month bar imposed against a sister local following an unsuccessful vote should operate as against the applicant local union - No evidence that applicant was the alter ego to the sister local or that it was applying in name only - Bar not operating as against the applicant

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KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206

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NIAGARA BRONZE LIMITED; RE G.M.P. AND JACK ERSKINE, ET AL

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Unfair Labour Practice - Practice and Procedure - Remedies - Complainant attempting in a letter

VIII

to the Board following the conclusion of the hearing to expand the proceedings to litigate a matter not previously understood by the parties nor the Board to be an issue - No useful purpose would be served by inquiring into matter because matter complained of had been fully remedied - Complaint dismissed

GUDELJ, MR. IVAN; RE G.M.P.; RE CANRON INC.....

1297-89-M Tracy Castellan, Applicant v. Chatelaine Villa Nursing Home, Respondent

Employee - Employee Reference - Parties - Applicant individual requesting a determination as to the employee status of another individual - No “question” as to employee status arising between the parties - Procedure under s.106(2) not available to the applicant - Application dismissed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members D. A. MacDonald and B. L. Armstrong.

DECISION OF THE BOARD; August 28, 1989

1. This is an application under section 106(2) of the *Labour Relations Act* in which the applicant, Tracy Castellan, is seeking a determination as to whether Linda Sacco, whom the applicant asserts is classified as “ward clerk” or “unit co-ordinator”, is an employee for purposes of the Act. It is the position of the applicant that Linda Sacco is not an employee by virtue of section 1(3)(b) of the Act.

2. It is appropriate at this juncture to set out the following passage from *Central Park Lodges of Canada*, [1980] OLRB Rep. Oct. 1373 wherein the Board rejected an application by persons whom the employer (by virtue of its position in an earlier Board proceeding) and the trade union agreed were employees within the meaning of the Act:

15. The contention of the applicant in the present case has been considered and rejected in at least three previous Board cases. In *Wallace Barnes Limited* 61 CLLC ¶16,198, an employee claimed that she had been improperly discharged and that by virtue of section 1(2) of the Act [which provides that a person does not cease to be an employee by reason of a discharge contrary to a collective agreement] and 95(2), the Board has jurisdiction to determine whether she was still an employee. In dismissing the application the Board commented:

“In sum, then, it appears to us that when the Legislation is looked at as a whole section 68 [now section 95] subsection 2, is designed to deal with questions which may arise between the parties who are negotiating a collective agreement and between the parties to a collective agreement during its operation. Moreover, in our view, it was never intended that employees should be able to refer a question under section 68(2) to the Board but rather this was to be left to one or more of the parties to the agreement. While in a sense employees in the bargaining unit are parties to a collective agreement, since a trade union acts as their bargaining agent, having chosen that agent to act on their behalf they are bound by its actions and, if a collective agreement exists, by the terms of that collective agreement.”

In *Indusmin Limited* [1975] OLRB Rep. March 184, a request by individual employees for a determination of their status was also rejected. Finally, in *York University* [1978] OLRB Rep. August 790, the Board dealt with a situation in which a group of employees alleged that they were “guards”, and thereby excluded from a bargaining unit because of section 11 of *The Labour Relations Act*. As in the present case, neither the union representing them, nor their employer regarded them as “guards” and it was acknowledged that they had been treated as employees by the parties’ collective agreement. In dismissing the application, the Board had this to say:

“In our view there must be a present question arising between the parties to the collective bargaining relationship before there can be a section 95(2) referral. Certainly, it is clear that for a question to arise “in the course of bargaining for a collective agreement” it could be necessary for such question to be raised in the “bargaining forum” and must therefore be a question between the parties to that bargaining relationship i.e. the bargaining agent and the employer; we are of the opinion, that it is no less implicit in the language of the section that the question which must arise dur-

ing the period of operation of the agreement must also be a question between the parties to that agreement."

16. In *York University*, the Board found that the "guard's exclusion" was intended to protect the interests of the employer, since the inclusion of guards in the bargaining unit might generate a conflict of interest with respect to the protection of the company's property. Section 95(2), in turn, was "intended to promote the stability of labour relations by making available a forum for the settlement of particular questions, where there [sic] are interfering with the general collective bargaining relationship". Where the parties had agreed that the employees in question were not "guards", there was no interference with the collective bargaining relationship; and where the company itself had treated the alleged guards as ordinary employees, the Board saw little likelihood of subverting the interests which section 11 was designed to protect. In the result, the Board found that section 95 was restricted to question which arose *between the parties*, at the bargaining table, or pursuant to the administration of the collective agreement.

17. In our view, the scheme of the Act, the decided cases, and the ramifications of an alternative interpretation, all support the inference that section 95(2) was only intended to resolve disputes between the immediate parties to the bargaining relationship. Section 1(3)(b) is designed to protect the institutional interests and integrity of the bargaining parties; but no such interests are at issue here, and it is unlikely that the mischief to which section 1(3)(b) is directed would arise where the company and the union have mutually agreed on the distribution of "managerial" authority, the composition of the "managerial team", and the scope of the bargaining unit. Indeed, if the parties have been able to reach such agreement, there are good policy and practical reasons why it should not be disturbed. It would not further a stable collective bargaining relationship if the parties could be plunged into litigation on matters which they have already settled - even though an individual employee may be dissatisfied with that settlement. Moreover, it seems strange, from a practical point of view, to suggest that the Board should be entertaining applications brought for the purpose of demonstrating that a company has more (or fewer) managers than either it or the employees' bargaining agent think it has. We agree with the view expressed by the Board in *York University*, *supra* that it is implicit that a "question" arising during the negotiation of a collective agreement must involve a question *between the bargaining parties* which must be resolved in order to assist them to reach a collective agreement; and that it is also implicit that a "question" arising during the operation of the collective agreement, is intended to refer to disputes between the parties who have a responsibility for administering that agreement (i.e. the trade union and the employer). Having carefully considered the various submissions of the parties, we are satisfied that section 95 was only intended to resolve issues between the bargaining parties; and was not intended to provide a forum in which employees could question their status when that status was not a matter of dispute between their employer or their trade union. In our view, it is implicit that the "question" to which section 95 refers must involve a question arising between the bargaining parties during the negotiating or operation of the collective agreement.

[Section 95(2) of the Act referred to above is now section 106(2).]

3. In the instant case, the applicant is an individual requesting a determination as to the employee status of another individual. No "question" has arisen between the bargaining parties. The Board affirms the rationale expressed in *Central Park Lodges*, *supra*, and the cases cited therein with respect to the purpose of the statutory provision: see also *Vernon John Hermer*, [1988] OLRB Rep. Feb. 152. Accordingly, the Board finds that the procedure in section 106(2) is not available to the applicant.

4. For the foregoing reasons, this application is hereby dismissed.

3311-86-R; 0303-87-R; 3365-86-R; 3366-86-R; 3367-86-R; 3368-86-R; 3369-86-R; 3370-86-R; 3372-86-R; 3373-86-R; 3374-86-R; 3375-86-R; 3376-86-R; 3393-86-R; 3454-86-R; 2255-87-U; 2374-87-U; 3525-86-U; 2159-88-U Labourers' International Union of North America, Local 183, Applicant v. **E. M. Carpentry (1982) Limited**, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27 (formerly Local 1190), Intervener; Labourers' International Union of North America, Local 183, Applicant v. Westroyal Carpentry Ltd., Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27 (formerly Local 1190), Intervener; Labourers' International Union of North America, Local 183, Applicant v. Camo Construction, Respondent; Labourers' International Union of North America, Local 183, Applicant v. B. Bezeau Framing, Respondent; Labourers' International Union of North America, Local 183, Applicant v. Pipau Construction, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; Labourers' International Union of North America, Local 183, Applicant v. Joeb Construction, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27 (formerly Local 1190), Intervener; Labourers' International Union of North America, Local 183, Applicant v. Lopes Carpentry, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; Labourers' International Union of North America, Local 183, Applicant v. Oliveira Carpentry Contractors, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; Labourers' International Union of North America, Local 183, Applicant v. Belmonte Carpentry Ltd., Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27 (formerly Local 1190), Intervener; Labourers' International Union of North America, Local 183, Applicant v. Landl Construction, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; Labourers' International Union of North America, Local 183, Applicant v. Cayouette Framer, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; Labourers' International Union of North America, Local 183, Applicant v. Zemars Carpenters Ltd., Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; Labourers' International Union of North America, Local 183, Applicant v. Divo Construction, Respondent; Labourers' International Union of North America, Local 183, Applicant v. P & F Carpentry, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27 (formerly Local 1190), Intervener; Labourers' International Union of North America, Local 183, Applicant v. M. Lanteigne Construction, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. Labourers' International Union of North America, Local 183 and E. M. Carpenters (1982) Ltd., Respondents; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. Labourers' International Union of North America, Local 183, E. M. Carpenters (1982) Ltd., Oliveira Carpentry, Belmonte Carpentry, Lopes

Carpentry and Camo Construction, Respondents; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. Labourers' International Union of North America, Local 183 and E. M. Carpentry (1982) Limited, Respondents; United Brotherhood of Carpenters and Joiners of America, Local 27 v. Labourers' International Union of North America, Local 183, Respondent

Certification - Construction Industry - Dependent Contractor - Employee - Carpentry contractor contracting with pieceworkers to perform carpentry work on low-rise residential housing - Pieceworkers may employ one or more "helpers" - Whether pieceworkers and helpers are employees of the carpentry contractor - Parties agreeing that a pieceworker with a single helper should be on the employee list - Board finding that helpers are the employees of the pieceworkers and not the carpentry contractor - Board determining that a pieceworker with more than one helper is an employer and independent contractor - In determining whether a pieceworker is an employer, the Board focuses on how many helpers a pieceworker employs on the application date and not simply how many helpers are at work on the application date

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *C. M. Mitchell* and *C. Detoni* for the Labourers; *Mauro Angeloni* for the respondents *E. M.* and *Westroyal*; *Dave Watson* and *Joe Almeida* for the Carpenters; no one appearing for the other employer respondents.

DECISION OF THE BOARD; August 31, 1989

1. The Board has before it a number of applications for certification pertaining to the construction industry. In addition, it has before it a number of complaints under section 89 of the Act.
2. In Board File No. 3311-86-R, Labourers' International Union of North America, Local 183 ("Local 183") applied for certification on March 10, 1987 in an attempt to displace the United Brotherhood of Carpenters and Joiners of America, Local 27 ("Local 27") as the bargaining agent for all carpenters and carpenters' apprentices in Board Area #8 employed by *E. M. Carpenters (1982) Ltd.* ("*E. M.*"). In addition to this application, Local 183 made a number of applications for certification which have a relationship to the *E. M.* application. As well, Local 27 has made a number of section 89 complaints which could impact on the success of Local 183's *E. M.* and related applications. For purposes of this decision, it is unnecessary to set out the details of the other Local 183 applications and Local 27's section 89 complaints. By decision dated May 7, 1987, the Board appointed a Board Officer to inquire into and report back to the Board concerning the list and composition of the bargaining unit in the *E. M.* application. Pursuant to his appointment, the Board Officer met with the parties on a considerable number of occasions between September 1987 and April 1988 and he called eight persons to give evidence. Local 27 called six persons to give evidence and Local 183 called one person to testify. A copy of the Board Officer's Interim Report ("Report I") was sent to each party, together with a (Form 68) Notice of Report of a Labour Relations Officer. The Board notes that, in addition to the *E. M.* matter, the examinations referred to above were pursuant to the Board Officer's appointment in *P & F Carpentry* (Board File No. 3393-86-R) and *Belmonte Carpentry Ltd.* (Board File No. 3372-86-R).
3. In Board File No. 0303-87-R, Local 183 applied for certification on April 30, 1987 requesting a pre-hearing representation vote in an attempt to displace Local 27 as the bargaining agent for all carpenters and carpenters' apprentices in Board Area #8 employed by *Westroyal Carpentry Ltd.* ("*Westroyal*"). In a decision dated May 28, 1987, the Board (differently constituted)

directed the taking of a pre-hearing representation vote. Given the dispute regarding the composition of the bargaining unit and the list of employees in the bargaining unit, the Board also directed that each ballot cast be segregated and that the ballot box be sealed. The vote was taken on June 10, 1987. By decision dated July 21, 1987, a different panel of the Board appointed a Board Officer to inquire into and report back to the Board concerning the dispute between the parties relating to the composition of the bargaining unit and the list of employees. Pursuant to her appointment, the Board Officer met with the parties and examined four persons. A copy of the Board Officer's Report ("Report II") was sent to each party, together with a (Form 68) Notice of Report of a Labour Relations Officer.

4. Four days of hearing were required to entertain the parties' submissions with respect to the conclusions the Board should reach in view of Reports I and II. The parties agreed that the E. M. and the Westroyal cases be argued at the same time given the similar issues in both files. In this decision, the Board is in a position to resolve all of the outstanding issues between the parties in the Westroyal application. The same cannot be said for the E. M. application. The parties involved in the E. M. matter and the panel members expect that a decision on some key issues will assist the parties in resolving the remaining issues in dispute.

5. The primary issue in the E. M. application, which is also present in the Westroyal application, can be simply stated as follows. E. M. is a carpentry contractor engaged in the construction of low-rise residential housing. E. M. obtains a contract from a builder and, in turn, it will contract with what we refer to in this decision as "pieceworkers" to perform the carpentry work. A pieceworker may have what we will refer to in this decision as "helpers". Local 27, E. M. and Westroyal take the position that the pieceworkers and their helpers are all employees of the carpentry contractor. Local 183 takes the position that once a pieceworker has more than one helper, that pieceworker is an employer and, therefore, the pieceworker and his helpers cannot be found to be employees of the carpentry contractor. In the E. M. application, there is also a dispute between the parties as to whether three persons exercise managerial functions pursuant to section 1(3)(b) of the *Labour Relations Act*. In both the E. M. and Westroyal applications, the parties cannot agree on whether certain persons performed bargaining unit work on the application date. The Board will first deal with the issue of the status of the pieceworker and helpers and in doing so we note that the material facts relevant to this issue in Reports I and II are the same. In other words, we did not find any material difference in the nature of the relationship between the helper, the pieceworker and the carpentry contractor in Report I and Report II. In setting out the facts and our conclusions relating to the primary issue, any reference to E. M. applies equally to the situation with Westroyal, except where noted otherwise, and the Board will often refer to both respondents as the carpentry contractor.

STATUS OF THE PIECEWORKER AND HELPERS

6. As previously noted, E. M. obtains contracts for the performance of carpentry work from builders. It appears to be the case that over the years a builder will utilize the services of the same carpentry contractors. At any given time, E. M. could have ongoing jobs at a number of subdivisions in a fairly wide geographic area. A builder will have a supervisor responsible for the construction activity at each subdivision. The builder's supervisor will coordinate the work of the various trades and is usually responsible for supplying the various contractors with materials. It appears that the builders supply the carpentry contractors with the lumber required for the job. The builder's supervisor will supply blueprints to the carpentry contractor as well as advise the carpentry contractor what and when houses should be constructed.

7. A. Marelli owns E. M. and he is the individual who obtains the carpentry work for E.

M. from the builders. It is usually the case that E. M. will have a foreman at each site responsible for the carpentry work who reports directly to Marelli. If the job at a particular site is small, E. M. may not assign a foreman permanently to that site, and if the site is a large one, E. M. may have more than one foreman at the site. It is common in this industry to have the carpentry contractor engage the services of pieceworkers. It is also usual for the pieceworkers to utilize the services of helpers. A pieceworker and his helpers are commonly referred to as a crew. Almost all of the carpentry work on a low-rise residential construction site is actually performed by pieceworkers and helpers. E. M. does have a small number of employees it pays on an hourly basis. These employees primarily perform repair work which is sometimes necessary as a result of the failure of the pieceworker to perform the job properly.

8. The carpentry work performed by the various crews consists of doing the footings, the framing, windows and doors and work that is described as roughing-in work. It appears that each crew generally performs only one of these aspects of the carpentry work. For instance, one crew will only do framing work, which involves building the wooden frame for the house, while another crew will only do windows and doors. Some crews may engage in the work of more than one aspect of the carpentry work, particularly when work is slow, but this is the exception rather than the rule. It is therefore the case that on any subdivision, one will have some crews doing framing, some doing windows and doors etc. It would be unusual for crews performing different types of carpentry work to be working on the same house at the same time.

9. The makeup of the crews and their legal status vary considerably. A pieceworker may consist of a single individual, a partnership of two or more individuals, or a limited company with one, two or more principals. These pieceworkers may have no helpers, one helper or a number of helpers. Given the evidence in the Reports, it appears to be quite common to have a pieceworker consisting of a registered partnership utilizing two helpers. The number of helpers used by a pieceworker can vary at any given time depending on a number of factors including the amount of carpentry work available and the pieceworker's success in finding suitable helpers.

10. In order to appreciate the nature of the dispute between the parties it is useful to set out what the parties are agreed upon. The parties are agreed that the sole proprietor, the partners, irrespective of how many in a partnership, and the principals of a limited company, irrespective of how many, as long as they all do not employ two or more helpers, are employees of the carpentry contractor and should be on the list of employees in the bargaining unit. More specifically, no party has challenged the appropriateness of having both a pieceworker and a single helper on the list of employees. Local 27, E. M. and Westroyal do not make such a challenge since it is consistent with their view that all pieceworkers and helpers are employees of the carpentry contractor under the Act. Local 183 does not make such a challenge since it views a pieceworker with one helper as a dependent contractor and considers only the pieceworker with two or more helpers as an independent contractor and not an employee of the carpentry contractor. Accordingly, by their agreement, the parties have not made the status of the pieceworker with a single helper an issue in this proceeding. We note that Local 27 took the position before us that if the Board finds that a pieceworker with more than one helper is an independent contractor and therefore that the pieceworker and helpers are not in the E. M. and Westroyal bargaining unit, it reserved its right to argue in any subsequent proceeding that any pieceworker who employs only one helper cannot be considered to be an employee under the Act. The Board is left then to only decide the status of the pieceworker who has more than one helper. Given the nature of the dispute between the parties, one is required to examine the relationship between the carpentry contractor, the pieceworker and the helpers. Although Local 183 and Local 27 have competed for the support of carpentry employees working in the low-rise residential field since 1980, the time when trade unions began to orga-

nize employees in this industry, this is the first occasion that these parties have placed before the Board the issue of the status of the pieceworker who has more than one helper.

11. We note that the relationships the Board is required to examine exist in the context of mature bargaining relationships. Local 27 has represented those persons covered by its E. M. and Westroyal collective agreements for some time. Report I contains a considerable amount of evidence concerning the way in which Local 183 and Local 27 have addressed the status of the pieceworker and helpers in bargaining over the years. Local 27 has consistently signed collective agreements which cover all pieceworkers and their helpers. In recent years, Local 183, consistent with its position in this case, has signed collective agreements with carpentry contractors which cover, among others, a pieceworker with one helper but do not cover a pieceworker with two or more helpers. Any pieceworker in this latter category would be covered by the subcontracting clause and would be required to sign an agreement with Local 183. In their submissions relating to this negotiating history, Local 183 and Local 27 argued that its particular collective bargaining response to the circumstances of the low-rise residential field best reflect the reality and make the most labour relations sense.

12. The material facts relevant to the status of the pieceworker with more than one helper are as follows. The carpentry contractor determines the number of crews it will utilize on any given project and the amount of money it will pay for the carpentry work required on each house. The carpentry contractor usually prepares a sheet which sets out the amount it will pay for certain carpentry work on a particular type of home. This amount is based on the square footage of the home. Given the particular style of home, the sheet would indicate that a certain amount (e.g. \$4,000.00) will be paid for framing, a certain amount for windows and doors, etc. The evidence in the Reports disclose that there is virtually no negotiation over the rates between the carpentry contractor and the pieceworker. If the pieceworker decides that the rate offered by the carpentry contractor is acceptable, they enter into an oral agreement to the effect that the pieceworker will be paid the price set out on the sheet upon completion of its performance of certain carpentry work on the house. If the pieceworker determines that the price offered by the carpentry contractor is too low, he will not perform work for that particular carpentry contractor and will attempt to find work somewhere else. The oral agreement between the carpentry contractor and the pieceworker does not include an understanding of how much work the pieceworker will obtain, nor does the pieceworker commit himself to the performance of work on a certain number of houses. In deciding whether to work for a particular carpentry contractor, the pieceworker will take into account, among other considerations, the price being paid per house, the amount of work the carpentry contractor has and whether the carpentry contractor pays soon after being invoiced. There is nothing preventing a pieceworker from leaving a particular carpentry contractor if he decides he can get a better deal somewhere else. In addition to the flat sums paid per house, the carpentry contractor and pieceworker agree on an hourly rate that will be paid for certain kinds of work. For instance, a pieceworker who is requested to add something not on the original plans or who is asked to perform repair work will be paid on an hourly basis for the work of the crew.

13. In addition to determining how many and which pieceworkers it will utilize and what it will pay to the pieceworker for the carpentry work performed on a house, the carpentry contractor usually has a person on site who supervises the carpentry work. This person, usually referred to as the carpentry foreman, will assign a pieceworker a particular house to build. The carpentry foreman will inspect the house to ensure that the pieceworker is performing the carpentry work in accordance with the building plans. If the pieceworker's work is not satisfactory in some way, the carpentry foreman will ask him to correct the problem. If the pieceworker elects not to do this, others will be asked to correct the problem and the pieceworker will be back-charged. Although

the lumber is supplied by the builder, the carpentry foreman ensures that the lumber required for each house is brought to the house by means of a forklift that is owned by the carpentry contractor.

14. The carpentry contractor pays the pieceworker the agreed upon amount once the house is completed, without deductions. In other words, the carpentry contractor does not deduct from the amount owing to the pieceworker such items as taxes, U.I.C. premiums, union dues, etc. At the completion of each house, the carpentry contractor pays directly to the pieceworker the full amount it has been invoiced by the pieceworker, less perhaps any backcharges. The Local 27 collective agreement with E. M. provides that E. M. will pay 6% of the amount it pays to the pieceworker to Local 27 for benefits for the pieceworker and helpers. The pieceworker is required to provide the names of the crew members to the carpentry contractor, who in turn passes them on to Local 27 along with the 6%. The pieceworker pays the members of the crew from the amount received from the carpentry contractor.

15. The Reports contain a considerable amount of evidence concerning the relationship between the pieceworker and his helpers. The pieceworker decides whether he will have helpers and, if so, how many. The carpentry contractor may on occasion direct a helper to a particular pieceworker, but the decision to hire a helper and which helper to hire is made solely by the pieceworker. Similarly, when it comes to matters such as discharge, discipline and lay-off, it is the pieceworker who decides, not the carpentry contractor. These decisions concerning helpers are undoubtedly influenced by the amount of work a pieceworker is able to obtain from the carpentry contractor. If a pieceworker decides to leave a carpentry contractor, the helpers of that pieceworker leave as well. In other words, the crew is a unit under the control of the pieceworker. There is evidence in Report I to the effect that helpers in certain crews are not experienced enough to work on their own and would not do so in the absence of the pieceworker.

16. With one exception, the pieceworkers covered in the Reports pay their helpers an hourly rate. The decision to pay an hourly rate, as opposed to a piecework rate, is made by the pieceworker. In addition, the pieceworker decides what the hourly rate will be, when increases will be paid to the helpers and what the size of the increases will be. The Reports disclose that a pieceworker's helpers will be paid different hourly rates depending on the experience of the helper and his length of service with the pieceworker. It is the pieceworker who decides whether overtime will be paid, when overtime will be paid and at what rate. All matters relating to remuneration, such as vacation pay, the pay period etc. are determined by the pieceworker without any input from the carpentry contractor. With respect to a number of these monetary items, the evidence of the pieceworkers is that they made their decisions without regard to the collective agreement between E. M. and Local 27. Most of the pieceworkers were unable to say what payment was required by the Local 27 collective agreement.

17. Although the carpentry foreman supervises in a general sense the work of the crews, the pieceworker supervises the helpers. The pieceworker assigns work to the helper on a daily basis. If a carpentry foreman notices that a helper is not properly performing his work, he will advise the pieceworker of this situation if the pieceworker is present. The pieceworker determines the hours of work for the crew, when it will start and when it will finish for the day. The pieceworker decides whether the crew will work on any given day. Decisions regarding when vacations will be taken and whether a helper can have a day off are made by the pieceworker. The carpentry contractor does not determine these matters.

18. The pieceworker deducts the normal statutory deductions from a helper's pay. For instance, taxes are deducted and remitted. The pieceworker will pay W.C.B. premiums on behalf of his helpers. Some pieceworkers deduct dues from the helpers and remit them to Local 27, while

other helpers of some pieceworkers pay their dues directly to Local 27. Most pieceworkers have a bookkeeper, do not advertise their business, although they might advertise for helpers, and do not have a business phone number. Pieceworkers file their tax returns as a business. In other words, they deduct from their income all their expenses, such as monies paid for helpers, fuel, depreciation, etc.

19. The only material the pieceworkers provide is nails. The other materials required for the carpentry work are supplied by either the builder or the carpentry contractor. With respect to equipment, the helpers provide their own hammer and pouch. The carpentry contractor may provide some of the more expensive tools, such as a riveting gun. Most of the tools used by the pieceworker and helpers, such as levels, saws etc. are owned by the pieceworker.

20. It does not appear from the material in the Reports that the carpentry contractor has any rules of conduct which apply to the pieceworker and his helpers. In one instance, a pieceworker was drinking on the job and indicated that E. M. could not prohibit him from doing this and did not have any rule prohibiting such conduct as far as he was aware. This same pieceworker did have rules governing the conduct of his helpers, one of which was that they could not drink during working hours.

21. The number and quality of the helpers has a significant impact on the profitability of the pieceworker's operation. Since the pieceworker is paid on a production basis, the more a pieceworker can produce in a given time frame, the more a pieceworker will make. The more experienced and skilful a helper, the more money the pieceworker can make off the helper. The more helpers used, the more production can be supplied by the pieceworker, and therefore the more he will make. A pieceworker with a number of helpers can have a crew working for E. M. and on that same day have two helpers working for someone else. In Report I, there is an example of a pieceworker who made less in 1987 even though the rates for that year were higher than in 1986 because he was able to find more helpers in 1986 and was able to produce more.

22. Local 27 argues that the Board should apply its usual displacement policy and find the pieceworker and helper to be included in the bargaining units. With an application for certification that attempts to displace a bargaining agent in circumstances such as these, Local 27 argues that the Board's general rule is that the applicant must take the bargaining unit of the incumbent and the persons falling within that bargaining unit. Counsel for Local 27 submits that since the collective agreements it has with E. M. and Westroyal cover pieceworkers and their helpers, the application of the Board's displacement policy should require Local 183 to take all of the pieceworkers and all of their helpers. Alternatively, Local 27 argues that the pieceworkers and their helpers are employees of the carpentry contractor. Counsel for Local 27 submits that the degree of control exercised by E. M. and Westroyal over the pieceworker and their helpers and the extent of the integration of the operations of the carpentry contractor and the pieceworker should lead the Board to find that the pieceworker and the helpers are all employees of either Westroyal or E. M.

23. As we understand it, there is no dispute between the parties concerning the description of the appropriate bargaining units for the E. M. and Westroyal applications. The bargaining units for the Local 183 applications involving E. M. and Westroyal will be described in the same way as they are described in the Local 27 collective agreements with E. M. and Westroyal. In effect then, we are not confronted with a dispute between these parties concerning the Board's policy in defining a bargaining unit in a displacement application for certification. The essence of Local 27's position is that Local 183 is bound by the determinations of the parties to the Local 27 collective agreements with respect to who is included in the unit and who is not. The Board agrees with the submission of counsel for Local 183 that Local 183 is not bound by any agreement between Local

27, E. M. and Westroyal concerning the coverage of their collective agreement. It is open to Local 183 to argue that certain persons are employers and therefore not employees in the bargaining unit for purposes of its applications, even though the parties to the bargaining relationship treated those persons as employees.

24. In determining which of two or more entities is the employer of certain persons for purposes of the *Labour Relations Act*, the Board examines the following criteria set out in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645 at page 648:

- (1) The party exercising direction and control over the employees performing the work. - See the *Municipality of Metropolitan Toronto* case, 61 CLLC ¶16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. Sept. 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. May 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. June 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. July 753, 761.
- (2) The party bearing the burden of remuneration. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. Oct. 487, 488; the *Kel Truck Services Ltd.* case, 1972 CLLC ¶16,068; and the *Templet Services* case, [1974] OLRB Rep. Sept. 606, 608.
- (3) The party imposing discipline. - See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party which is perceived to be the employer by the employees. - See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. - See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

25. After extensively canvassing the jurisprudence, the Board in *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538 explained the manner in which these criteria are to be applied:

43. The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

44. A particularly important question answerable through an evaluation of all of the factors set out in *York Condominium* is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in *York Condominium* inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the

seat of fundamental control is generally to find the employer for the purposes of *The Labour Relations Act*.

26. Local 27 argues that the facts disclose that E. M. and Westroyal exercise fundamental control over the pieceworker and helpers. In particular, it emphasizes that the carpentry contractor is the source of the work, that it determines how much and when work will be allocated to a pieceworker, that the carpentry contractor “hires” and “fires” the crew, and that it inspects the work of the crew. Local 27 points out that the facts suggest that the carpentry foreman supervises the work of the pieceworker and helpers.

27. The factors which Local 27 points to do not in our view indicate that the carpentry contractors in these cases exercise fundamental control of the sort which would cause us to find the pieceworkers and helpers are employees of the carpentry contractors. The nature of the contractual relationship between the pieceworker and the carpentry contractor will result in the exercise of some control over the pieceworker and helpers by the carpentry contractor. Those factors emphasized by Local 27 flow from this contractual relationship which is not dissimilar from the usual contractor-subcontractor relationship. When the Board speaks of fundamental control, it is with respect to those matters which are material to the employment relationship.

28. When examining the facts of these two cases in light of the criteria set out in *York Condominium Corporation, supra*, it is difficult to conclude that the helpers are employed by the carpentry contractors. The pieceworker exercises direction and control over the employees performing the work. Although counsel for Local 27 argued that the carpentry foreman exercised this role, the evidence in the Reports does not support this contention. The pieceworker determines when the helpers start and finish their work day, whether they will work at all and what specific tasks they will perform. Although there is some evidence to indicate that the carpentry foreman on occasion does deal directly with a helper, the weight of the evidence supports the conclusion that the general procedure is for the carpentry foreman to raise any concerns he has with the pieceworker and then it is left to the pieceworker to decide what action, if any, he will take. From the helpers' perspective, the party bearing the burden of remuneration is the pieceworker. The pieceworker is paid a lumpsum from the carpentry contractor leading Local 27 to argue that, in essence, the carpentry contractor bears the burden of remuneration. Since the carpentry contractor is only, in one sense, redirecting money received from the builder, the logic of Local 27's position would lead one to conclude that the builder has the burden of remuneration. The reality is that the pieceworker bears the burden of paying the helpers, not the carpentry contractor. The pieceworker determines how, what and when the helper will be paid. In addition, the pieceworker determines how it will pay overtime, vacation pay, etc. The pieceworker hires, lays off, fires and disciplines the helpers. The carpentry contractor does “hire” and “dismiss” pieceworker crews, but only in the sense that it will determine whether to subcontract work or to continue to subcontract work to a particular entity. The evidence in the Reports reveals that the helpers perceive the pieceworkers to be their employer. Even though E. M., Westroyal and Local 27 agree that the helpers are covered by the Local 27 collective agreement with E. M. and Westroyal, the evidence in the Reports does not disclose the existence of an intention to create the relationship of employer and employee between the carpentry contractors and the helpers. Other than being obliged to provide Local 27 with the names of the crew members for benefit purposes, the carpentry contractor has little interest in how many helpers a pieceworker has, who they are and what they are paid. There was no doubt in the minds of the pieceworkers who testified that their helpers were their employees. For the most part, the pieceworkers examined did not consider themselves to be employees of the carpentry contractor. An examination of the criteria referred to above and the evidence in the Reports generally points clearly to the conclusion that the pieceworkers working for E. M. and Westroyal who have

more than one helper exercise fundamental control over those helpers. Therefore, the Board is satisfied that a pieceworker with more than one helper is the employer of the helpers.

29. Having determined that the helpers are employees of the pieceworkers and not employees of the carpentry contractor, we turn to the issue of whether the pieceworker with two or more helpers should be included in the bargaining unit. All parties agree that the pieceworkers are economically dependent on E. M. and Westroyal. However, Local 183 takes the position that a pieceworker who employs two or more helpers is not a dependent contractor. E. M., Westroyal and Local 27 oppose this position.

30. A dependent contractor is defined in the *Labour Relations Act* in the following terms:

1.-(1)(h) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

31. In *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806, the Board was required to decide whether an owner and operator of ten trucks who employed drivers to operate the vehicles was a dependent contractor. The Board noted that in addition to considering economic dependency, it was necessary to consider the total character of the business in deciding whether a person more closely resembles an employee or an independent contractor in his relationship with an employer and that the employment of others is an important factor in defining the relationship. The Board asked whether the employment of others is a factor which in and of itself colours the character of the business so as to remove its owner beyond the scope of the dependent contractor provision and answered this question in the affirmative. In reaching its conclusion, the Board made the following comments:

20. In seeking to draw the line in such a way as to bring within the Act those dependent contractors who by the nature of their business more closely resemble employees and to exclude those who more closely resemble independent contractors the Board has been struck by the qualitative difference between the contractor who derives income from the labour of others and the contractor who does not. The Board takes the view that the line must be drawn so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. It must be found that the nature of their business is such that within the meaning of the Act they more closely resemble independent contractors than employees in their relationship with the employer. The exclusion of these persons accords with the statutory definition and also maintains the clear division between employers and employees created by the overall scheme of The Labour Relations Act.

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22. If the Board was to extend the benefits of The Labour Relations Act to certain employers simply because of their economic dependency, the result would be to create the very potential for conflict of interest which the Act is designed to prevent. The constitution of the applicant in this matter extends membership eligibility to both dependent contractor-employers and to the employees of these persons conditional upon a finding by the Board that they are "employees" for purposes of the Act. If the applicant were to organize the employees of one of these dependent contractor-employers, the anomalous situation of an employer and his employees belonging to the same union would exist. (See *Dr. George A. Morgan U.A.W. Dental Centre*, [1977] OLRB Rep. Jan. 1.) The Act must be interpreted in such a way as to avoid the potential for conflict of interest which might thus develop if dependent contractor-employers were found to be "dependent contractors" within the meaning of the Act.

23. Having decided that the line should be drawn to exclude dependent contractor-employers from the meaning of "dependent contractor" as defined in Section 1(ga) [now 1(1)(h)] of the Act, the Board must emphasize that its decision in this regard is intended to exclude only dependent contractors who are employers in substance as well as form. It is this type of dependent contractor who more closely resembles an independent contractor than an employee. A dependent contractor with the authority to hire, fire, discipline, and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections of The Labour Relations Act. If, however, it is found that a dependent contractor does not possess this type of authority, then, notwithstanding the fact that he may be the nominal employer of others, he may still be entitled to bargain collectively under The Labour Relations Act.

32. The applicant in *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083 sought a bargaining unit of persons who were engaged by the dairy to deliver its products as contractors or franchised dealers. One of the positions advanced by the respondent was that the persons whom the applicant sought to represent were independent contractors. Of the twelve drivers examined, eleven drove one truck, while one owned two trucks. The Board in this case applied the general principle in *Canada Crushed Stone, supra*, and determined that the person owning two trucks was an independent contractor. For our purposes, the following comments of the Board are worth noting:

32. The exception from the Board's finding is Mr. Leo Lanoue. Mr. Lanoue owns and operates two trucks. The trucks are used to service separate routes on a full-time basis. Normally he drives one and his son drives the other, but at the date of examination he was not active on the trucks, and both were being driven by persons employed by Mr. Lanoue. In its decision in *Canada Crushed Stone* [1977] OLRB Rep. Dec. 806, the Board noted that the dependent contractor provisions of The Labour Relations Act do not extend the protection and benefits of collective bargaining to persons who are themselves sufficiently entrepreneurial as to be substantially engaged in deriving profit from the labour of others. While the Act has been extended to protect persons in a position of economic dependence whose whole endeavour is analogous to wage earning, it does not extend to give the added strength of collective bargaining to contractors who are substantially engaged in an entrepreneurial undertaking with a view to the pursuit of greater profit through the employment of others.

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37. The circumstances of Mr. Lanoue, however, take him outside the principles which apply to a contractor who uses a helper to lighten his load. At the time of the examinations he performed no work and apparently derived all of his income as a profit from the labour of two employees who drove his two trucks. And while he normally drives one of his trucks, he employs his son on a permanent basis to drive the other, thereby substantially increasing the volume of his sales and the resulting profit to himself. Those facts cause the Board to view Mr. Lanoue as more closely resembling an independent contractor or distributor than an employee in his relationship with the respondent. The Board therefore finds that he is not a dependent contractor within the meaning of The Labour Relations Act.

33. In reviewing the evidence in the Reports concerning those pieceworkers with two or more helpers, the Board is satisfied that these pieceworkers are engaged in an entrepreneurial activity of the sort which more closely resembles that of an independent contractor rather than that of an employee. The more helpers a pieceworker has, the greater the opportunity to increase his profitability. The pieceworker in this situation is clearly profiting from the labour of others and is very much the master of his own business. To use the language in *Canada Crushed Stone*, the pieceworkers with two or more helpers are employers in substance as well as form. Their power to hire, fire, discipline and to set the terms and conditions of employment of their helpers, even though the pieceworkers are economically dependent on a carpentry contractor, indicate that the pieceworkers with more than one helper more closely resemble an independent contractor and are entities which are not entitled to the benefits and protections of the Act. Accordingly, for the rea-

sons set out above, the Board finds that a pieceworker with more than one helper working for E. M. or Westroyal is an employer and independent contractor and that these pieceworkers and their helpers are not employees falling within either the E. M. or Westroyal bargaining unit for purposes of the E. M. and Westroyal applications.

34. Before moving on to the other major issues, one other matter requires resolution. Local 183 argued that in deciding whether a pieceworker is a dependent or independent contractor, the Board's focus should only be on the situation as it exists on the application date. Since all parties agreed that the pieceworkers are economically dependent and that the only factor which is determinative of the issue is whether or not the pieceworker employs more than one helper, Local 183 in effect argues that what should determine the status of the pieceworker is the number of helpers, if any, that worked on the application date. If a pieceworker regularly employs five helpers but for certain reasons only the pieceworker and one helper worked on the application date, Local 183 submits that the Board should consider that pieceworker to be a dependent contractor and include both the pieceworker and helper in the bargaining unit. E. M. and Westroyal agree with Local 183 while Local 27 disagrees. Local 27 takes the view that one must look beyond who actually works on the application date in order to determine whether an entity is an independent or dependent contractor.

35. As counsel for Local 183 noted, the Board has developed a number of rules that it applies in the context of certification applications. For instance, the Board has a 30-30 rule which determines who is employed in the bargaining unit in an industrial application for certification. With respect to such applications, the Board also uses a four out of seven week rule to determine whether an employee is employed on a part-time or full-time basis. Rules of this sort are necessary in order to guide the conduct of the parties and to assist in the processing of applications expeditiously. Counsel for Local 183 suggests that without the rule which Local 183 is advocating, applicants will be faced with uncertainty, have difficulty organizing and become involved in unnecessary extended litigation.

36. In construction industry applications for certification, the Board determines who is an employee by concentrating only on whether an individual is engaged in bargaining unit work on the application date. An employee engaged in carpentry work on the date of the application will be included in the bargaining unit even though that employee never previously performed carpentry work and is unlikely to ever again engage in such work for a respondent. We do not intend to detail the reasons why the Board adopts this rule since the reasons can be found in other decisions. The following cases explain the Board's approach in focusing on the application date in the construction industry rather than on a representative period: *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Jan. 220; and *Runnymede Development Corporation Limited*, [1988] OLRB Rep. Sept. 976. We note that the Board has often indicated that it will look to other criteria to assist it in determining whether an individual is an employee in the bargaining unit on the application date when there is no conclusive evidence concerning the work being performed on the application date. The application of the day of application rule in the above example will still only result in carpenters being included in the bargaining unit on the application date. In other words, although the temporal framework which the Board utilizes in construction industry applications for certification is very short, the application of the rule will not result in persons falling within the bargaining unit description who are not in the bargaining unit on the application date. The same cannot be said for the rule which Local 183 asks us to adopt.

37. Local 183's rule for determining whether a pieceworker is a dependent contractor in essence is based only on the number of helpers that work on the application date. If a pieceworker regularly employs five helpers but for some reason only the pieceworker works on the application

date, the effect of applying Local 183's rule would be not to treat such a pieceworker as an employer and to include the pieceworker in the bargaining unit. However, the fact that no helpers show up at work on the application date does not change in any material way the pieceworker's status as an employer. Employer status questions cannot reasonably be determined by whether or not any employees are at work on a given day. Applying the rule proposed by Local 183 would result in employers being included in a bargaining unit. To adopt a rule which would lead to such a result appears to us to be inconsistent with the general scheme of the Act. We agree that the Board should focus on the application date. In doing so, however, the Board finds it would be inappropriate to limit the focus on that day simply to the number of helpers who worked, as suggested by Local 183, rather than on inquiring into how many helpers a pieceworker employs, whether at work on the application date or not.

38. Having rejected the position advocated by Local 183, the Board is satisfied that the ability of trade unions to organize employees in this industry will not be significantly more difficult. Given the rules agreed to by these parties, an organizer is faced with a fairly complicated task. We note in passing that the organizer's task is certainly not simplified when a distinction must be made between a pieceworker who employs one helper and a pieceworker who employs more than one helper. If confronted with a four-person crew, the organizer must ask questions so as to determine whether the four persons are partners, whether they are principals in a limited company, whether there are two partners and two helpers, whether there are three partners and one helper, etc. Only with such an inquiry will the organizer be able to determine who is an employee and who are employers. By rejecting Local 183's rule, the organizer will only have to ask, in situations where only one or no helpers are working on the application date, whether there are any helpers not working on that day.

39. In applying the general conclusions set out above and the agreement of the parties with respect to the pieceworker with a single helper to the material facts disclosed in Reports I and II, the Board has made the following findings concerning the persons that were examined:

E. M.

1. The pieceworkers in the following crews were independent contractors at the relevant time (in other words, the pieceworkers employed two or more helpers) with the result that the pieceworker and their helpers do not fall within the E. M. bargaining unit:

- (a) P & F Carpentry
- (b) Joeb construction (later known as Barbosa Construction Limited)

The Board is satisfied that Jose Barbosa, the pieceworker, employed helpers at the relevant time. In our view, the fact that Barbosa paid his helpers on a pieceworker basis rather than on an hourly basis does not alter the nature of the relationship between Barbosa and those persons he hires to perform carpentry work.

- (c) A. Lopes Carpentry Contractor
- (d) 496089 Ontario Limited c.o.b. as T. Carpentry

(e) Belmonte Carpentry Limited.

2. The pieceworkers in the following crews were dependent contractors at the relevant time (in other words; the pieceworker employed no more than one helper) with the result that the pieceworker and helper would fall within the E. M. bargaining unit (assuming they worked on the application date):

(a) Divo Construction

(b) J & J Carpentry

(c) Marzio Carpentry

(d) Ray's Carpentry.

Westroyal

1. The pieceworker in the following crew was an independent contractor at the relevant time (it employed two or more helpers) with the result that the pieceworker and helpers do not fall within the Westroyal bargaining unit:

Scorpio Carpentry.

2. The pieceworkers in the following crews were dependent contractors at the relevant time (the pieceworker employed no more than one helper) with the result that the pieceworker and helper would fall within the Westroyal bargaining unit (assuming they worked on the application date):

(a) G & B Carpentry

(b) P. Z. Carpentry.

SECTION 1(3)(b) ISSUE IN E. M.

40. The parties were unable to agree on the status of G. Prosdocimo, G. Clausi and G. Biagioni. Local 183 argues that these three individuals do not exercise managerial functions within the meaning of section 1(3)(b) of the Act. Local 27 argues just the opposite. The parties agreed that the evidence of G. Prosdocimo would be treated by the Board as representative of the duties and responsibilities of G. Clausi and G. Biagioni.

41. As noted earlier, A. Morelli owns E. M. The evidence in Report I does not suggest that Morelli spends any significant amount of time on the job site. He selects persons to be in charge of a job site and this is a general description of what Prosdocimo does. In his evidence, Prosdocimo indicates he is a foreman and that he is paid a weekly salary. In a general sense, Prosdocimo supervises the pieceworkers and their helpers and in a more direct sense, he supervises the hourly employees of E. M. With respect to the few hourly employees of E. M., he is in complete charge of where they will work, what they will do and he ensures that they perform the carpentry work properly. He checks the weekly time sheets of these employees to ensure their accuracy. With respect to the pieceworkers, Prosdocimo advises them what house to work on and ensures that the houses are ready for inspection.

42. Prosdocimo indicated in his evidence that he spends approximately two-thirds of his time bringing lumber to the pieceworker crews by means of a forklift. His remaining time is spent inspecting the houses. If changes are required to be made, he will direct the pieceworker to make them. Rarely will Prosdocimo work with the tools.

43. Prosdocimo does not have the ultimate authority to decide to hire, to fire or to determine rates of pay. That authority rests with Morelli, the owner. However, it is clear from the evidence in Report I that Prosdocimo has an effective recommendation power. If the work of a subdivision requires one or more additional crews, Prosdocimo will advise Morelli accordingly. If Morelli decides to "hire" another crew, which would likely be the case, Prosdocimo will proceed to find another crew. His recommendation to Morelli that E. M. take on a particular crew would likely be accepted. It is not uncommon for crews to approach the carpentry foreman for work. In these circumstances, Prosdocimo, being the person most familiar with what is taking place on the job site, will make recommendations to Morelli concerning taking on an additional crew. Although the pieceworker rates and hourly rates are determined by Morelli, Prosdocimo will have a significant input into whether Morelli will adjust the rate. This would particularly be the case for the hourly employees E. M. hires directly who work under Prosdocimo's supervision. The two hourly employees of E. M. who were examined perceived Prosdocimo as having authority to hire and fire.

44. The Board does not propose to engage in a lengthy review of the Board's section 1(3)(b) jurisprudence. In *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199, the Board describes the purpose of section 1(3)(b) as follows:

8. The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have "divided loyalties". ...

After commenting that the Act does not contain a definition of the term "managerial functions" nor any specified criteria to guide the Board, the Board stated in paragraph 9 that:

... The task of developing such criteria has fallen to the Board, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so-called "first line" managerial employees, an important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is clearly incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

45. Prosdocimo, in effect, represents E. M. on the job site. The supervisory role he performs and his authority to make effective recommendations concerning a number of significant matters, leads us to find that Prosdocimo, Clausi and Biagioni exercise managerial functions within the meaning of section 1(3)(b) of the Act. They exercise the kind of direct authority which leads us to conclude that their inclusion in the bargaining unit would place them in a position of conflict of

interest as between their managerial responsibilities and obligations and their responsibilities as union members or members of the bargaining unit.

WERE CERTAIN PERSONS EMPLOYED ON THE APPLICATION DATE?

46. With respect to both the E. M. and Westroyal applications, the parties were unable to agree on whether certain persons worked on the date of the application. Our conclusions with respect to this issue are set out below. Before setting out our conclusions, we note the following. The Board entertained submissions concerning which party has the onus in disputes of this sort. It is unnecessary for us to decide this issue, since we did not find the evidence with respect to any of the persons in dispute to be equally balanced. We note as well that in deciding this issue insofar as the Westroyal application is concerned, the Board did not give any weight to Exhibit #6 filed by Local 27. Exhibit #6, a certified copy of a statement from the Ontario Weather Centre for April 1987, was merely filed at the examination by Local 27. The Board agrees with the submission of Local 183 that this document was not properly proved. Finally, it is unnecessary for the Board to decide whether some of the persons in dispute worked on the application date since these persons would be excluded from the bargaining unit in any event given the Board's finding that a piece-worker with more than one helper is an independent contractor and therefore is excluded from the bargaining unit.

47. The parties could not agree at the examination stage on whether C. Gomez, a partner in Divo Construction, was at work on March 10, 1986. In argument, Local 27 conceded that C. Gomez did not work on the application date. The Board is satisfied that C. Gomez was on vacation on March 10, 1986 and, therefore, is not a person who performed bargaining unit work on the application date. Local 183 takes the position that no member of the J & J Carpentry crew worked on March 10, 1986. The Board is satisfied that all members of that crew, namely J. Desousa, F. Martins and J. Martins, performed bargaining unit work on the application date. Local 183 argues that R. McKinnon, a helper for Ray's Carpentry, did not work on March 10, 1986. The Board is satisfied that R. McKinnon did work on the application date. McKinnon worked 26 hours in the week the application was filed and then sustained a work-related injury which kept him off work for some time. Given the evidence and the fact that March 10, 1986 was a Tuesday, the Board is satisfied that McKinnon probably worked in the bargaining unit on March 10, 1986.

WESTROYAL

48. Local 183 took the position that the partners in G. B. Carpentry, namely A. Barrasso and G. Gentile, and certain persons associated with P & Z Carpentry, namely R. Zambito and L. Zambito, did not perform bargaining unit work on April 30, 1987, the application date.

49. Report II contains evidence from both A. Barrasso and G. Gentile. The parties agreed that the testimony given by Gentile coupled with the testimony given by Barrasso will be representative of the full testimony for Gentile on all questions and issues related to this matter. Gentile was certain he worked with Barrasso on March 10, 1986. After reviewing the evidence of Gentile and Barrasso and the parties' submissions, the Board is satisfied on the balance of probabilities that Barrasso and Gentile performed bargaining unit work on the application date.

50. The parties agreed that the testimony of P. Zambito is representative of L. Zambito. P. Zambito was quite certain he worked on April 30, 1987. The evidence concerning L. Zambito is that he worked 54 hours during a three-week period within which the application was filed. In reviewing the evidence of P. Zambito and the parties' submissions, the Board finds that P. Zambito did work on the application date but that L. Zambito did not.

SUMMARY

51. As noted at the outset, the Board's determinations concerning the E. M. application will not finalize the matter. The parties to that application are directed to continue to meet with a Board Officer in an attempt to resolve the outstanding matters in dispute between them.

52. With respect to the Westroyal application, having regard to the agreement of the parties, the Board hereby finds that all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

53. In its decision of May 28, 1987 where it directed the taking of the pre-hearing representation vote, the Board found that it appeared that Local 183 had the requisite degree of membership among the employees whom all parties agreed were in the voting constituency at the relevant time as required by section 9(2) of the Act. At that time, the Board did not make any decision with respect to the issues that must be determined under section 9(4) of the Act. Given our findings referred to above with respect to the six persons in dispute, and the agreement of the parties with respect to certain persons, the Board finds that the following persons were employed by and performed bargaining unit work for Westroyal on the application date: F. Gallipi, D. Gandolfi, P. Gentile, D. Rossi, V. Rossi, P. Rucella, A. Whelan, A. Barrasso, G. Gentile and P. Zambito.

54. Local 183 filed membership evidence on behalf of three employees who were employed by Westroyal and in the bargaining unit on the application date. The Board is satisfied that less than thirty-five per cent of the employees of Westroyal in the bargaining unit were members of the applicant at the time the application was made. Accordingly, Local 183's application for certification in Board File No. 0303-87-R is dismissed.

55. The votes cast in the pre-hearing representation vote will not be counted and the Registrar will destroy the ballots cast following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

3195-88-R Teamsters Local Union 938, Applicant v. The Corporation of the City of Gloucester, Respondent v. The Association of Municipal Employees, Intervener

Certification - Trade Union - Whether six month bar imposed against a sister local following an unsuccessful vote should operate as against the applicant local union - No evidence that applicant was the alter ego to the sister local or that it was applying in name only - Bar not operating as against the applicant

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*.

APPEARANCES: *Linda Huebscher*, *Mike McBride* and *John Raudoy* for the applicant; *Jacques A. Emond* and *Jock Jardine* for the respondent; *Sean McGee* and *Francois Dutrisac* for the intervener.

DECISION OF THE BOARD; August 4, 1989

1. This is an application for certification in which a pre-hearing vote was taken pursuant to a decision of the Board (differently constituted) dated April 21, 1989. Further to that decision the ballot box was sealed and the ballots cast were not counted pending the hearing of certain matters remaining in dispute.

2. At the hearing convened to deal with those matters, the respondent and intervener challenged the trade union status of the applicant. However, after hearing evidence, both the respondent and intervener indicated to the Board that they were satisfied that the applicant had properly shown itself to be a trade union within the meaning of the *Labour Relations Act* and made no further submissions on the issue.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties remained in dispute with respect to whether or not the applicant was entitled to bring this application for certification. The respondent and intervener both asserted that the applicant did not have the jurisdiction under its local Charter to organize these employees situate in Gloucester in eastern Ontario and secondly, that even if such jurisdiction did entitle the applicant to organize these employees, that a six month bar imposed against a sister local following an unsuccessful vote should operate as against the applicant as well. The applicant ("Local 938") disputed both these assertions.

5. Some of the history leading up to this application was reviewed in the Board's decision of April 21, 1989 as follows:

3. The unit represented by the intervener was recently the subject of a certification application in Board File 2358-88-R, in which Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 ("Local 91") was the applicant. In that application, the Board directed that a pre-hearing representation vote be taken in a voting constituency described as consisting of:

all hourly and salaried permanent employees of the Recreation Facilities and the Parks Divisions of the Recreation and Parks Department of the respondent.

Clarity Note: The employees in [the voting constituency] are those employees listed in Appendices A & B attached to the collective agreement between the Corporation of the City of Gloucester and the Association of Municipal Employees.

The vote so directed was conducted on February 13, 1989. Not more than fifty per cent of the ballots cast were in favour of Local 91. Its application was therefore dismissed on March 28, 1989, in a decision which noted that:

19. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in voting constituency #1 within the period of six months from the date hereof.

6. In dealing with the issue of whether or not Local 938 has the jurisdiction to organize these employees, the respondent asks the Board to interpret the local's Charter and more specifically the words, "... brewery, soft drink, distillery, distributors and miscellaneous workers in the Province of Ontario, Canada...". The respondent asserts (and the intervener supports the assertion) that the words "miscellaneous workers" refer only to a category of miscellaneous workers within the brewery, soft drink, and distillery industry and not to a more "generic" worker employed anywhere in Ontario. Additionally, the intervener argues that "miscellaneous workers" would not include "public employees" as this group is specifically referred to in the International Union's Constitution.

7. The respondent asserts that Local 938 by virtue of this alleged limitation on its jurisdiction from the International does not have the authority to organize these workers; that to do so Local 938 would be acting *ultra vires* its Constitution and By-Laws. Counsel did not provide the Board with any authority for the proposition that such a limitation would affect the union's right to bring the application. The applicant has satisfied the Board that it is a trade union within the meaning of the Act. Consequently it is entitled to bring an application for certification, in this case pursuant to section 9 of the Act. A limitation in a union's enabling structure (whether by its constitution, local Charter, or other) may, subject to section 103(4) of the Act, affect whether or not a person is eligible for membership in the trade union, and consequently, the level of membership support enjoyed by the union. However that was not the position taken here by either the respondent or intervener.

8. In any event, the Board is satisfied on the evidence that Local 938 can organize these employees and properly admit them to membership in the local union. The uncontradicted evidence is that the jurisdiction of Local 938 was expanded following the merger of Locals 353 and 1000 into Local 938. Mr. Ray Bartolotti, now a Business Representative with Local 938 and previously President of Local 1000 for twelve years, testified that the words in question referred to that jurisdiction previously granted to Local 1000 by the International Union. Local 1000 was established to try and organize brewery workers, but it was felt at the time that the local would require a broader scope in order to become and remain viable, hence the inclusion of "miscellaneous workers in the Province of Ontario". In 1985, following a number of plant closures involving employers of members of Local 1000 and a consequent loss of membership in the local, it decided to try to merge with another union. It approached Local 938 because it was large. According to Mr. Bartolotti and Mr. McKinlay, Vice-President of Local 938, Local 938 was interested in accepting a merger with Local 1000 because of the opportunity to expand its jurisdiction to include that enjoyed by Local 1000.

9. This broad interpretation of the words "miscellaneous workers" appears to be supported by the other language used in Local 938's Charter. In contrast to the use of the words "miscellaneous workers" the term "allied workers" is used for example with respect to "car hauler industry employees and allied workers" and "airline industry, fuel, bus, limousine and petroleum drivers and allied workers". This would seem to suggest an industry-wide limitation. In light of the explanation provided by Mr. Bartolotti and the language itself, the Board cannot conclude that any similar limitation exists with respect to the words "miscellaneous workers".

10. The intervener argued that the employees affected by this application were "public employees" as those words were used in the International Constitution and not therefore "miscellaneous workers". The specific reference to "public employees" in the International Constitution is of little assistance. There is no reference to "miscellaneous workers" in the International Constitution. It states in Article II Section 1(a) that "this organization has jurisdiction over all workers including, without limitation ..." whereafter a variety of types of workers are listed including public employees. It makes no reference to public employees as a group distinct from other "miscellaneous" groups in the list.

11. With respect to the issue of whether or not the bar imposed on Local 91 should operate as against Local 938, the respondent asserted that Local 938 is an "alter ego" of Local 91. The intervener asks the Board to find that there is an agreement between Local 91 and Local 938 and/or the Teamster's Joint Council that Local 938 "put its name on the application and Local 91 would do all the work". To allow Local 938 to apply at this time would, it was argued, circumvent the reason behind imposing the bar. The intervener asks the Board to look at Local 938's involvement in this application as a case of form over substance. Counsel points to the fact, acknowledged in evidence, that Local 938 used Local 91's organizer to assist in this application. Both the respondent and intervener argue that because the General Executive Board of the International Union has the overriding constitutional authority to determine jurisdictional disputes between locals and as a consequence can transfer members between locals, the intention must be that Local 91 was to be engaged in the servicing of this group of employees were this application successful. Such a result, it was submitted, would be directly contrary to the wishes of the employees as expressed in the earlier unsuccessful vote.

12. It was the union's position that there was no evidence from which such conclusions could be drawn. Furthermore, to suggest that this application was one of form only was an attempt to look behind the membership evidence filed. In support of its position, the applicant referred us to *Swingline of Canada Ltd.*, [1971] OLRB Rep. Nov. 710 wherein the Board dealt with a similar situation:

"10. The respondent took the position that the application should be dismissed on the grounds of timeliness since a sister local of the applicant had made an earlier application to be certified as bargaining agent for the same employees with whom we are here concerned and that earlier application was dismissed following the taking of a representation vote which was held three months prior to the making of the instant application. A bar was placed on the sister local for a period of six months in accordance with the Board's usual practice. Since the applicant is a separate entity from the union that was dismissed in the earlier application and since the applicant's membership evidence is separate and distinct from the evidence of membership which was filed by the sister local in the earlier application and again since the applicant was not a party to the earlier application and no order was made in the earlier application barring the applicant in this matter, for the reasons given in *The Hydro-Electric Power Commission of Ontario case*, OLRB Monthly Report, November 1966, p. 596; *The American Standard Products (Canada) Limited Case*, OLRB Monthly Report, February 1965, p. 590; the *Milsom Floors Limited Case*, OLRB Monthly Report, September 1966, Board File No. 12166-66-R; and *The Hydro-Electric Commission of the City of Hamilton Case*, (1962) CLLC 1119, the Board is not prepared to find that the applicant in this matter is bound by the bar placed by the Board on its sister local or that the instant application is untimely."

13. In *Pinehill Auto Ltd.*, [1968] OLRB Rep. July 375 the Board was asked not to entertain an application for certification or, alternatively, to direct the taking of a representation vote. A local union had requested leave to withdraw its application for certification but, having regard to the stage of the proceedings, the Board had dismissed the application. Less than two months later, a sister local brought another application for certification for the same unit of employees. In deciding to entertain the application the Board said:

“4. The Board has always treated an international or national trade union as a separate and distinct entity apart from its locals and has also treated each local of a trade union as a separate and distinct entity. Accordingly, when a local of a trade union makes an application for certification for a unit of employees that another local of the same trade union has just previously unsuccessfully sought certification, the new applicant is in no different position than if the application had been made by an entirely different trade union or one of its locals.”

(See also *Elm Tree Nursing Home*, [1978] OLRB Rep. Nov. 984; *The Clorox Company of Canada Ltd.*, [1980] OLRB Rep. Feb. 184.)

14. There is no evidence of any agreement between these locals or as between the locals and the Joint Council that Local 938 act as “alter ego” to Local 91 or that Local 938 is “applying in name only”. Neither the respondent or the intervener dispute the fact that Local 91 and Local 938 are established as two distinct local unions, each having status as a trade union in its own right. There is no evidence of any dispute between the local unions which would warrant the General Executive Board’s intervention. At the start of the hearing in this matter, the panel disclosed to the parties the form of the membership evidence filed in this application. It clearly refers to the applicant and there is no reference to Local 91. This is not a matter of form only. In applications for certification if membership evidence is filed with reference to one local union and the applicant is a different local union the application will be dismissed. This reflects the Board’s traditional view that parent and local unions, or sister locals of the same parent union each have distinct and separate status under the *Labour Relations Act*.

15. The evidence also establishes that it is not uncommon for one Teamster’s local to make use of the resources, particularly staff of another local or the International, to assist in organizing. In *Elm Tree Nursing Home*, *supra* at p. 987, the Board concluded that the fact that the same person conducted the organizing in both the unsuccessful first campaign and the second challenged application was irrelevant to whether the second application by the International was subject to the bar imposed against the local union. In *The Sisters of St. Joseph of the Diocese of London*, [1972] OLRB Rep. Oct. 846 the Board refused to entertain an application for certification where it was shown that the unsuccessful applicant disbanded and a new trade union was formed as a means to avoid the bar imposed on its predecessor. Such is not the case here. Local 938 was first chartered in 1945 and has been a large and active local union. (See also *Creeds Storage Ltd.*, [1984] OLRB Rep. May 712).

16. In light of the above, we find that the bar imposed against Local 91 does not operate against the applicant. The parties are agreed that this application is otherwise timely. The Board therefore orders that the ballot box be opened and the ballots counted forthwith. This matter is referred to the Registrar in order that an Officer of the Board may make arrangements with the parties for the counting of the ballots.

1906-88-U Mr. Ivan Gudelj, Complainant v. Glass, Molders, Pottery, Plastics and Allied Workers International Union, Respondent v. Canron Inc., Intervener

Practice and Procedure - Remedies - Unfair Labour Practice - Complainant attempting in a letter to the Board following the conclusion of the hearing to expand the proceedings to litigate a matter not previously understood by the parties nor the Board to be an issue - No useful purpose would be served by inquiring into matter because matter complained of had been fully remedied - Complaint dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

APPEARANCES: *M. Gorodensky* and *Ivan Gudelj* for the complainant; *Joanne L. McMahon*, *Ross Armstrong* and *Mohammedali Inshanally* and *Carl Hamilton* for the respondent; *Karen J. Weinstein*, *Brenda Kops* and *Alex Mestres* for the intervener.

DECISION OF THE BOARD; August 24, 1989

1. In a decision dated July 17, 1989, the Board dismissed those aspects of this complaint arising out of a grievance filed in September, 1985 by the complainant Mr. Gudelj. In that decision the Board noted that it would "remain seized with respect to the remaining matter, the issue of the publication by the union of a retraction letter concerning Mr. Gudelj's ability to run for union office. If no party notifies the Board by August 12, 1989, either that this matter is settled or that any or all of the parties want the matter listed for hearing, then this remaining aspect of the complaint will be dismissed."

2. With respect to the remaining issue, the Board received a letter dated July 27, 1989, from counsel for the union which asserted that the union had published the retraction in question, and further asserted that counsel for Mr. Gudelj had agreed that the letter was properly posted and that the union had therefore fulfilled its undertaking in that regard. The letter further requested that the remaining aspect of the complaint therefore be dismissed.

3. In response to this letter, counsel for Mr. Gudelj wrote to the Board in part, as follows:

We have had further discussions with Joanne McMahon, solicitor for the Glass, Molders, Pottery, Plastics and Allied International Union and have consented that the letter dated February 16th, 1989 was posted. At no time did we consent that the contents of that letter is [sic] to our satisfaction and hereby confirm that our client Mr. Ivin Gudelj is not satisfied with same.

Mr. Gudelj has instructed us that he would require an acknowledgement by the Glass, Molders, Pottery, Plastics and Allied Workers International Union that they have violated the Ontario Labour Relations Act by prohibiting him from holding any union position. We reiterate that at no time did we acknowledge that the union had fulfilled its undertaking but rather consented only to the fact that the letter dated February 16th, 1989 was duly posted at Canron Incorporated.

Counsel thereafter noted that he no longer represented Mr. Gudelj in this matter.

4. Counsel for the union responded, in part, as follows:

Please be advised that at the close of the hearing before Vice Chair R. Herman, Mr. Gudelj's complaint against the union was dismissed. One matter remained outstanding. Mr. Gudelj was not satisfied that the letter dated February 16, 1989, retracting the penalty imposed upon him by the union trial committee, was publicized to the members. In fact the letter was published verbally at a union membership meeting, was voted on and approved by the members, and was

then posted on plant premises. However, in order to avoid further proceedings, the union undertook to re-post the letter on plant premises and subsequently did so in two locations on July 13, 1989 and July 14, 1989. Mr. Gudelj was present on July 14, 1989 and witnessed the posting. There was no question at that time with respect to the contents of said letter, and the union undertaking incorporated only the re-posting.

As you can see from Vice-Chair Herman's decision (copy enclosed), the last paragraph indicates that the Board remains seized with respect to the issue of the publication by the union of a retractive letter concerning Mr. Gudelj's ability to run for office. If no party notifies the Board by August 12, 1989 that the matter is settled or that any party wants it listed for hearing, the remaining aspect of the complaint would be dismissed.

The union notified the Board on July 27, 1989 (copy enclosed) that it had fulfilled its undertaking to re-post the letter retracting Mr. Gudelj's penalty. We submit to you that our obligations on this matter have been fulfilled, and it is not incumbent upon the union to redraft the letter with which Mr. Gudelj has now decided he is not satisfied.

5. In a letter from his counsel dated April 5, 1989, Mr. Gudelj did allege that the decision by the respondent union to ban him from holding union office was a contravention of the *Labour Relations Act*. However, subsequently, at the commencement of the hearing into the complaint, counsel for Mr. Gudelj submitted to the Board that Mr. Gudelj had received already a full retraction of the prohibition against holding union office and therefore Mr. Gudelj was only seeking in this respect a direction from the union to fellow employees that the sentence had been retracted. The complaint proceeded on this basis, that the only matter at issue with respect to the prohibition against holding elected office was the publication by the union of a retraction, and not the initial decision to bar Mr. Gudelj from holding office, or for that matter the subsequent decision to completely and fully retract that sentence. The only issue that remained outstanding in light of our decision of July 17, 1989, was the issue of the publication by the union of the retraction letter, and not the issue, as now asserted by Mr. Gudelj, of whether the initial decision to bar him from running for union office constituted an unfair labour practice.

6. Mr. Gudelj is attempting at this late stage to expand the proceeding to litigate a matter not previously understood by the parties, nor the Board, to be an issue. Evidence has been led with respect to the events surrounding the decision to bar Mr. Gudelj from running for office, and to allow the complainant to now seek to raise this matter would involve prejudice to the other parties. Witnesses would have to be recalled and the hearings greatly protracted. This matter could have and should have been raised at the commencement of the proceedings. To the contrary, the Board was specifically advised at the commencement that Mr. Gudelj was no longer complaining about the prohibition against his running for office, only about the failure of the union to properly communicate the retraction of the prohibition. It would not be fair to allow him now to raise this matter.

7. Apart from this belated attempt at expansion of the proceeding, there is another more fundamental reason for declining to enquire into this matter further. Whether or not the decision of the union to prohibit Mr. Gudelj from running for or holding union office could or did constitute a breach of the *Labour Relations Act* (and was not strictly an internal union matter), there is no question that that decision has been fully and completely retracted. There is no assertion that Mr. Gudelj remains prejudiced by the (since nullified) decision barring him from running for office. To force the parties through lengthy and expensive litigation when the sole result might be a declaration that the initial conduct contravened the Act, and when the conduct complained of has already been fully retracted and its effects fully nullified, would serve no useful labour relations purpose and would be contrary to sound labour relations. Parties should be encouraged to settle their disputes and differences without requiring Board intervention. The threat of litigation has always been an impetus to consideration of alternative means of resolving the problem. If litigation will

still result when the discipline or penalty has been rescinded by the party who imposed it, there would be less incentive for a party to seriously consider a complaint about its behaviour and to respond to a complainant's concern. And to allow litigation in the circumstances would be to invite litigation over every act in the workplace which someone felt was unjustified. Matters of principle can be, in given circumstances, important apart from any practical ramifications and can be worth pursuing to litigation. And there may well be cases where the retraction or rescission of the penalty is not sufficient to repair the damage. But this is not the case here. The only reason for Mr. Gudelj further pursuing this complaint is to extract a declaration that the union breached the Act.

8. Accordingly, we decline to enquire into whether the decision to bar Mr. Gudelj from holding union office was a violation of the Act. To do so would not be consistent with sound labour relations principles or practice. Further, no meaningful remedy would issue in the circumstances. In this respect we might usefully refer to *Capall Investments Limited* [1985] OLRB Reports February 221.

9. For the above reasons, the remaining aspect of this complaint is dismissed.

1171-89-FC The United Food & Commercial Workers Union, Local 206, Applicant v. Knob Hill Farms Limited, Respondent

Bargaining Rights - Certification - First Contract Arbitration - Reconsideration - Trade Union Status - Applicant seeking to amend its name - Board permitting name to be amended - No prejudice to respondent - First contract application adjourned sine die pending the disposition of the union's request for reconsideration in a certification matter

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. Lear* and *E. G. Theobald*.

APPEARANCES: *Joanne L. McMahon*, *Ronald Springall* and *Michael Duden* for the applicant; *Michael Gordon* and *Howard Wood* for the Respondent.

DECISION OF THE BOARD; August 21, 1989, as amended September 20, 1989

1. On August 17, 1989, the Board delivered a unanimous oral ruling in this matter as follows:

This is an application, under section 40a of the *Labour Relations Act* for a direction that a first collective agreement be settled by arbitration.

The applicant had set out its name as being the "United Food and Commercial Workers International Union, Local 206".

As a preliminary matter, the respondent asserts that there is no entity by that name and, further, that that name does not describe any party which holds bargaining rights for any of its employees. The respondent submits that this application should therefore be dismissed. The applicant acknowledges that the name in which this application has been brought is not identical to the name which describes the trade union to which a certificate has been issued

by the Board with respect to employees of the respondent. However, it submits that the difference between its name and that which describes the trade union which holds the relevant bargaining rights is a mere technical irregularity, within the meaning of section 104 of the Act, and not one of substance. The applicant seeks to amend its name in this application to "The United Food & Commercial Workers Union, Local 206".

Pursuant to a certificate dated December 22, 1987 (issued pursuant to a decision of that same date and reported at *Knob Hill Farms Limited*, [1987] OLRB Rep. Dec. 1531), "The United Food & Commercial Workers Union, Local 206" was certified by the Board as the exclusive bargaining agent for all employees of the respondent at Oshawa, save and except Assistant Store Manager [sic], persons above the rank of Assistant Store Manager and office staff.

The differences between the name of the applicant herein and the trade union (as so found by the Board in its December 22, 1987 decision) are:

- (a) there is no "The" in the name of the applicant herein;
- (b) the word "and" separates the words "Food" and "Commercial" in the name of the applicant while an "&" separates those words in the name of the trade union certified by the Board;
- (c) the word "International" appears in the name of the applicant but not in the name of the certified trade union.

In *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517, at paragraph 6, the Board stated that:

6. The majority of the Board (Board Member Sarra dissenting) disagreed. On its face, the Board's decision in *Orchid Label and Printing Co. Ltd.*, *supra*, arose out of an agreement between the parties which resolved all of the matters in dispute between them and dispensed with a formal hearing into the matter. Further we are not entitled to go behind the finding of trade union status in the Board's decision. In the title of the Board's decision, the applicant is identified as being "Toronto Printing Pressmen & Assistants' Local No. 10" and it is only *that* entity, and no other, that was found by the Board to be a trade union within the meaning of section 1(1)(p) of the Act. Section 105 of the *Labour Relations Act* sets up a rebuttable evidentiary presumption of trade union status for organizations that the Board has previously found to be a trade union. Because of the nature of that provision, an applicant in certification proceedings is not entitled to the benefit thereof unless its name is identical to that which the Board has previously found to be a trade union. Even a relatively minor difference in name may reflect that an applicant with a name "similar to" or even "substantially the same as" that of an organization previously found to be a trade union is either an entirely different entity or that it has undergone some change which may result in it being a trade union no longer. It was therefore the view of the majority that the applicant in this proceeding is not entitled to the benefit of section 105 of the Act and that it was necessary for it to establish its status as a trade union independently.

At paragraph 20 of that decision the Board went on to say that:

... Although there are practical reasons, including the speed at which matters are processed by the Board, why a trade union might not want to be known by any name

other than its legal name, there is no reason in law why it cannot carry on business under a name other than that legal name, so long as it does not do so for any improper purpose....

As the Board explained in *Pioneer Mechanical Limited*, [1989] OLRB Rep. March 277, at paragraph 3:

3. The Board's comments in *Hartley Gibson Company Limited*, *supra*, should neither be taken out of context, nor applied without regard to the rationale for sections 104 and 105 of the *Labour Relations Act*; that is, that certification proceedings, which are supposed to be expeditious, do not become bogged down over matters which do not reveal any concern of substance. The Board is concerned with the label used by a trade union to identify itself to the extent that it adequately identifies it as such. For purposes of the provisions of section 105 of the *Labour Relations Act*, the label used by an applicant for certification must adequately identify it as an entity which the Board has previously found to be a trade union. In that regard, the Board will generally be concerned only with differences of substance between a label which has been found to identify a trade union (within the meaning of section 1(1)(p) of the Act) and the label used by an applicant for certification. Consequently, in the absence of an allegation that it is of some real significance, the Board will not normally concern itself with differences in punctuation, like the use of a comma instead of a dash (or, for example, an "&" instead of the word "and") which are no more than different ways to accomplish the same end; that is, to separate parts of a sentence or label. Nor, in the absence of specific allegations, will the Board be concerned with obvious *bona fide* minor mistakes in the naming of an applicant for certification (see section 104 of the Act), or different presentations of what is obviously the same thing, like, for example, use of the word "Pipefitting" instead of the words "Pipe Fitting". In our view, it would be unnecessarily technical and a waste of time and resources to do otherwise. In this case, there is no difference of substance between the two labels in question.

This is not a certification proceeding or any other kind of representation proceeding as such. Because of the nature of representation proceedings and the notice or notices which must be given in them, there is generally a greater concern with the names used to describe and identify the parties in such proceedings. Nevertheless, we find the Board's comments in *Pioneer Mechanical Limited*, *supra* to be generally apposite here as well.

We are not satisfied that the absence of the word "The" or the substitution of the word "and" for an "&" is a significant or substantial difference. The insertion of the word "International" is of a somewhat different nature, however, in that it is somewhat suggestive of a different entity. However, having regard to the material before us, including the statements by each party and the several books of documents filed, we are not satisfied that the respondent has been misled or prejudiced by the applicant naming itself as it has. In our view, the differences between the two names as aforesaid, merely once again demonstrates the applicant's apparent inability to get its own name right. In the circumstances, we are satisfied that the applicant is the same entity as the trade union certified by the Board as aforesaid and that its failure to correctly set out its name is a mere technical irregularity within the meaning of section 104 of the Act. We see no reason to not grant the amendment sought by the applicant and, accordingly, we find it appropriate to, and hereby do, amend the name of the applicant to "The United Food & Commercial Workers Union, Local 206."

As a second preliminary matter, the respondent raises what is, in our view, a

more serious concern. It submits that the Board should dismiss the application as being premature or, in the alternative, adjourn it pending the disposition of other proceedings pending before the Board.

Those proceedings are in Board File Nos. 0542-86-R and 0035-86-U; that is, the proceedings in which the applicant was certified as aforesaid.

By letter dated November 14, 1988, the respondent has sought reconsideration of the Board's decision to certify the applicant. More specifically, it requests that the Board void the certificate on the ground that the applicant and its counsel have violated section 58 of the Act.

In addition, the *applicant* has requested that the Board reconsider its December 22, 1987 decision by altering the certificate issued therein so that it is in the name of the United Food and Commercial Workers Union, Local 175 rather than in its name. It appears that the United Food and Commercial Workers Union, Local 175 and the International Union of which Locals 206 and 175 are apparently Locals have sought to join in that request.

Finally, a group of objecting employees (apparently the same group which participated in the certification proceedings) has delivered a petition in support of a request that the Board direct a representation vote.

The two requests for reconsideration and the question of what, if anything, should be done with the request and petition of the group of objecting employees are scheduled to be heard by the panel which issued the certification decision beginning on August 29, 1989.

In the absence of a proper application for a declaration terminating the bargaining rights of the applicant, in which case the Board would have to decide how to proceed pursuant to the provisions of section 40a (22) of the Act, the Board would not and does not consider the request by the group of objection employees as being an impediment to proceeding with this application.

In the absence of extraordinary circumstances, the Board would not generally consider a request for reconsideration by an employer in which it sought revocation of a certificate issued to an applicant seeking relief under section 40a of the Act to be such an impediment either. Because of the manner in which we find it appropriate to dispose of this second preliminary matter, we find it unnecessary to determine whether the respondent's request for reconsideration in this case falls within that category of extraordinary circumstances.

Our concern is that the applicant herein has itself, in a request for reconsideration presently pending before the Board, asserted that another entity; that is, the United Food and Commercial Workers Union, Local 175, and not it, holds the bargaining rights which form the basis and foundation of this application. In that regard we note that in other proceedings (*Knob Hill Farms Limited*, [1988] OLRB Rep. Aug. 810) the Board found that it could not declare Local 175 to be a successor to Local 206's statutory right to serve as the exclusive bargaining agent for employees of Knob Hill Farms Limited in the face of the assertions and concessions of its counsel. Further, the

Board has also found (in *Knob Hill Farms Limited*, [1989] OLRB Rep. Feb. 149), in essence, that Local 206 continues to exist, that Local 206 and Local 175 are not the same entity, and that Local 206 holds the bargaining rights with respect to which this application is concerned.

Yet Local 206 is itself, in effect, challenging its right to represent employees of the respondent. Although that challenge is made in other proceedings, the fact that it has been made is before us in this application. The applicant appears to say that its reconsideration request is a position advanced in the alternative to its response to the respondent's request for reconsideration and that the Board should not proceed with the applicant's request for reconsideration until the respondent's request is disposed of. However, the applicant cannot have it both ways and the fact is that its reconsideration request is before the Board. The numerous proceedings involving these and other parties and the positions adopted by the applicant herein have created a chaotic situation which must, in our view, be resolved before it is appropriate for an application under section 40a to proceed.

As for the applicant's assertion that it would be prejudiced by any delay occasioned by the Board not proceeding with this application, we note that it has been more than three years since the application for certification was filed. During that time, the applicant has not demonstrated any particular concern about delay and this application has been brought in a context in which events have overtaken the primacy of the goal of expedition in applications such as this one. In that regard also, we note that there appear to have been a number of causes for the delays which have occurred since the application for certification was first filed. While no one deserves to be blamed for it all, it appears to us that no small part of the the delay has been occasioned by the applicant itself, both by its apparent inability to set out its own name and confusion with respect to its identity, and otherwise. In short, the applicant is at least partly the architect of the situation in which it finds itself. We are not persuaded that any potential prejudice to the applicant at this point outweigh the need to have the reconsideration requests and the request of the objecting employees disposed of. Indeed, it may be that this applicant, as it itself has asserted (in other proceedings), has no right to bring this application at all.

In these circumstances, we would, if the time limits imposed by section 40a were mandatory, dismiss this application as being premature. However, in *Del Equipment Limited*, [1989] OLRB Rep. Jan. 19, the Board held that these time limits are directory rather than mandatory (see also *Nepean Roof & Trust Limited*, [1986] OLRB Rep. Sept. 1287). Accordingly, we find it appropriate to adjourn this application *sine die* pending the disposition of the requests for reconsideration and the request of the objecting employees in Board File Nos. 0542-86-R and 0035-86-U.

The Registrar is directed to schedule this application for hearing forthwith upon those matters being disposed of.

0071-89-U Niagara Bronze Limited, Complainant v. Glass, Molders, Pottery, Plastics and Allied Workers International Union and Jack Erskine, et al, Respondents

Collective Agreement - Duty to Bargain in Good Faith - Unfair Labour Practice - Collective agreement containing COLA clause negotiated - Employer believing COLA clause was suspended for the life of the agreement - Employer alleging that union breached its bargaining duty by not informing the employer of its mistaken belief - Union not obliged to question the employer's thinking when it makes a monetary offer - Complaint dismissed

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

APPEARANCES: *B. W. Adams* and *R. Tallman* for the complainant; *Edward C. Witthames* for the respondents.

DECISION OF THE BOARD; August 21, 1989

1. Ralph Tallman is the President and owner of the complainant, Niagara Bronze Limited ("the company"), a non-ferrous foundry located in Niagara Falls, Ontario. In 1987, Mr. Tallman, on behalf of the company, and Jack Erskine, an individually named respondent who is the staff representative for Glass Molders, Pottery, Plastics & Allied Workers International ("the union"), on behalf of the union, signed a collective agreement for 1986-1988 which contained a cost-of-living allowance ("C.O.L.A.") clause but which was subject to a Memorandum of Settlement which suspended the operation of the C.O.L.A. clause. The 1988-1990 collective agreement also contains the C.O.L.A. clause. Mr. Tallman was surprised to find out after the collective agreement had been executed that the union believed the C.O.L.A. clause to be operative. Mr. Tallman acknowledged that he had made a mistake, but contends that the union knew that and its failure to tell him so during bargaining and then claiming the benefit of the C.O.L.A. is bargaining in bad faith. The company therefore filed this complaint under section 89 of the *Labour Relations Act* ("the Act") alleging that the union, Mr. Erskine and Rudolfo Sorge, Hircy McRae, and Eugene Krzemien, who with Mr. Erskine made up the union's negotiating committee, have breached section 15 of the Act.

2. Mr. Tallman had negotiated for the company since 1975 and had been at negotiations as an observer for about seven years previously. He said there had been a C.O.L.A. clause in the collective agreements since 1974 or 1976. Negotiations for the 1988-1990 collective agreement began with the union's notice to bargain to the company dated September 29, 1988. Subsequently, Mr. Erskine met with the employees to develop the union's proposals; he told Mr. Tallman about the monetary proposals that evening, following that communication with a written statement of the proposed changes. At the bottom of that document is the following:

NOTE: Articles and sections not referred to in these proposals are considered unchanged and would continue to form part of the Collective Agreement.

The union's proposed changes made no reference to the C.O.L.A. clause. The Memorandum of Settlement dated November 21, 1988, signed by representatives of both the company (including Mr. Tallman) and the union, also made no reference to the C.O.L.A. and, indeed, it is agreed that the C.O.L.A. was not raised by either the company or the union at any time during negotiations.

3. In the previous agreement the C.O.L.A. clause, was subject to the following provision in the handwritten Memorandum of Settlement signed by representatives for the company (including Mr. Tallman) and the union, dated November 3, 1986:

C.O.L.A. FREEZE FOR LIFE OF AGREEMENT ONLY TO BE REINSTATED JANU-
ARY 1989 AS PER ARTICLE 25-03-5

Article 25-03-5 in both the 1986-1988 and 1988-1990 collective agreements provides for the manner in which cost of living adjustment are to be made “[c]ommencing with the pay period beginning on or after January 1989” and for the base for the calculation of the adjustments (the September 1988 and September 1989 Consumer Price Index).

4. The most recent agreement was signed by the parties on January 24, 1989 and was distributed by Loretta Hicks, the company’s controller, to the employees on January 26, 1989. The last employee to leave the plant was Hircy McRae, the plant chairman, and he made some comments to Ms. Hicks about the C.O.L.A. She related this conversation to Mr. Tallman the following Monday and after examining the collective agreement, Mr. Tallman realized that he had made a mistake. He had assumed, without giving any real thought to the matter, and without re-reading the previous agreement, that the C.O.L.A. clause was not operative. It seemed now that it was operative. He thought, however, that once the union understood the situation, it would not take advantage of his mistake except perhaps to obtain another benefit in exchange for giving up the C.O.L.A.

5. That Mr. Tallman had underestimated the union’s view of the situation was made clear when Mr. McRae filed a grievance dated February 20, 1989, claiming that the company was in violation of the collective agreement by not paying the employees the cost-of-living allowance. Mr. Tallman attempted to convince the employees not to pursue the matter but the union remained firm. We were advised that an arbitrator has now been appointed but the arbitration hearing has not been scheduled, pending the disposition of this complaint.

6. The issue before us, as characterized by counsel for the company, is “whether one party’s capitalizing on an error it sees being committed by the other party” constitutes a violation of section 15 of the Act. There is no allegation that the union made any misrepresentation upon which the company relied. There is no suggestion that the union did or said anything that could lead Mr. Tallman to make the assumption he did that the freeze on the C.O.L.A. applied. Rather, the argument is that the nature of the monetary package offered by the company was such that the union knew or must have known that the company did not believe C.O.L.A. had to be paid and that the union should have known that it and the company were negotiating based upon two different (and opposing) set of assumptions. The argument is that there was no “mutuality of intent”; the parties were not *ad idem* on this aspect of the contract. The union’s conduct in proceeding to capitalize on Mr. Tallman’s mistake is, says counsel, contrary to the legislative policy underlying the Act: harmonious labour relations.

7. Neither party was able to provide us with any case on point with the situation before us. The company’s counsel suggested that the closest analogy lies in the “disclosure” cases: see, for example, *Inglis Ltd.*, [1977] OLRB Rep. Mar. 128; *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411 (quashed on an unrelated matter, *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69* (1985), 51 O.R. (2d) 481 (Div. Ct.); appeal allowed (1986), 56 O.R. (2d) 513 (C.A.); application for leave to appeal to the Supreme Court of Canada allowed, March 26, 1987, (1987), 59 O.R. (2d) 736 note). As counsel acknowledged, the underlying thrust of these cases is the obligation on a party - in each of these cases, the employer - to disclose information, such as plans for relocation or shut down of the plant, of which it has knowledge and the other party - the union - does not, where the union asks questions about such plans or where the decision has been effectively made and the employer can see that it will have a significant impact on the bargaining

unit. The failure to disclose in such situations impairs the capacity of the union to bargain in a rational and informed way and may constitute a form of misrepresentation.

8. The disclosure cases are simply not applicable to our situation. Here, both parties had all the same information and at least as far as this issue is concerned, this is not a situation in which one party had access to information or had the ability or capacity to form an intent to make decisions which could affect the other without the other's knowledge. A more comparable case is *Interior Systems Contractors' Association of Ontario*, [1981] OLRB Rep. July 879, in which the union made a deliberate decision to use a strategy of silence in relation to whether the employees or the employer was responsible for providing screws and nails. The obligation on employees was part of the piece work provisions in earlier agreements. The union's proposed piece-work provision contained no reference to the obligation. The Board said in that case:

24. ... The employer in this case must be taken to have been aware of the terms of the preceding collective agreement upon which the union's proposals were based. The piece rate provisions and schedules were contained in the two amending agreements. To evaluate the union's new piece rate proposals the employer would have to have regard to, for the purposes of comparison, the two amending agreements as well as the original collective agreement. In any event, in responding to the union's proposals the employer, in the Board's view, had the responsibility for knowing the terms of its collective agreement, as amended, and for evaluating the effect of the union's proposals on that agreement, including the effect of leaving articles from the preceding agreement out of the proposed agreement.

9. The fact is that Mr. Tallman, for the company, did not check the preceding agreement; he gave no consideration to the effect of the limited freeze provision in the predecessor agreement; there was nothing preventing his doing so and certainly nothing the union did prevented his doing so. Even if the union did know he was operating under a mistake, the union is not obliged to question the employer's thinking when it makes a monetary offer, in effect to ask "are you sure you mean to offer us this much": the union is entitled to expect that the employer is familiar with the collective agreement and has compared the provisions of the previous agreements.

10. This complaint is therefore dismissed.

COMMENT OF BOARD MEMBER R. W. PIRRIE; August 21, 1989

1. I concur with the decision.

2. The union did nothing overt to mislead Mr. Tallman. He was simply lax in his administration vis-a-vis his labour relations responsibilities. It is my view the union was well aware of the error Mr. Tallman was committing in agreeing to the monetary terms of the November 21, 1988 Memorandum of Settlement, and in signing on January 24, 1989 the 1988-90 Collective Agreement incorporating these monetary terms. I do not believe a union's failure to bring an obvious employer error to the employer's attention, or vice versa, is a definition of a failure to bargain in good faith that the Board should attach to Section 15.

3. That said, one wonders at the wisdom of the Glass, Molders, Pottery, Plastics and Allied Workers International Union and their officials capitalizing on Mr. Tallman's error. At the very least, by so doing they have seriously impaired whatever relationship may have existed between themselves and Mr. Tallman.

4. More serious however is the impairment of the relationship between Mr. Tallman and the employees of the company. I only hope that by insisting on the operation of the C.O.L.A. clause as well as the substantial across-the-board wage increases, compounded by the substantial

costs inherent in the insurance company error concerning the back service pension improvement, that the livelihood of some or all of the long service employees is not put in jeopardy.

1213-88-U; 1446-88-G; 1570-88-G Nicholls-Radtke Limited, Complainant v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the U.S. and Canada Local 46, and Bill Weatherup, Respondents; Nicholls-Radtke Limited, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the U.S. and Canada Local 46, and Bill Weatherup, Respondents; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Applicant v. Nicholls-Radtke Limited, Respondent

Evidence - Employer seeking to introduce into evidence a tape recorded telephone conversation between the president of the company and an employee who was the shop steward - Tape recording not admissible as an exception to the hearsay rule - Alleged "admission" was not authorized by the union

BEFORE: *R. A. Furness, Vice-Chair, and Board Members J. Lear and S. Weslak.*

APPEARANCES: *M. Patrick Moran, Bill Nicholls, Sr. and Bill Nicholls, Jr. for Nicholls Radtke Limited; A. M. Minsky, Q.C. and William Weatherup for Local Union 46 and Bill Weatherup.*

DECISION OF THE BOARD; August 1, 1989

1. Counsel for Nicholls-Radtke Limited (the "employer") sought to introduce in evidence a tape recorded telephone conversation between William Nicholls, Sr., a vice-president of the employer and Brian St. John, an employee of the employer, a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 ("Local 46") and a steward for Local 46 on the employer's job site. This conversation was tape recorded without the knowledge of Mr. St. John.

2. Counsel for Local 46 objected to the introduction of this evidence on two grounds. Firstly, the conversation recorded on the tape and the transcript prepared therefrom is not a proper exception to the hearsay rule because Mr. St. John is neither an employee of nor an officer of Local 46 and accordingly his evidence is not a proper exception to the hearsay rule as an admission against interest. Secondly, the Board in the exercise of its discretion under section 103(2)(c) of the *Labour Relations Act* ought not to accept this evidence. Whether or not such evidence is admissible in a court of law such evidence was obtained without the knowledge of Mr. St. John and constituted a type of entrapment with its solicited responses.

3. The Board has considered the representations of the parties. With respect to the first ground raised by counsel for Local 46, the Board finds that there was no evidence before it that Mr. St. John was a paid officer of Local 46. In fact, he was an employee of the employer and paid by the employer. The duties of the steward are referred to in the collective agreement which is binding on Local 46 and the employer particularly at article 103 thereof. None of the duties set forth in the collective agreement include assisting the employer by reporting on the affairs of Local

46 and others. In reporting to Mr. Nicholls, Sr., Mr. St. John was not carrying out any prescribed duties as a steward for Local 46. The Board is not prepared to find that Mr. St. John was acting within the scope of his stewardship in his taped telephone conversation with Mr. Nicholls, Sr. The Board was not referred to any authorities which have stated that a union steward is the agent for his trade union.

4. The Ontario Court of Appeal has considered the circumstances under which an employee may make admissions which are admissible as evidence against his employer. In *Regina v. Strand Electric Ltd.*, [1969] 1 O.R. 190, MacKay, J.A., stated at page 193 as follows:

I am of the view that the Court below has right in holding that a supervisor on the location of the work was a person with authority as agent and employee of the appellant to make the admissions he did and that such statements were admissible as evidence as against the appellant company.

I adopt the statement of the author of *Cross on Evidence*, 2nd ed., pp. 441-2, as being a correct statement of the law on this point. The statement in part is:

Statements made by an agent within the scope of his authority to third persons during the continuance of the agency may be received as admissions against his principal in litigation to which the latter is a party. So far as the reception of admissions is concerned, the scope of authority is a strictly limited conception. It is sometimes said that the agent must be authorized to make the admission, but that is a confusing statement for no one expressly or impliedly authorizes others to make informal admissions on his behalf which may be proved against him in subsequent litigation. A better way of putting the matter is to say that the admission must have been made by the agent as part of a conversation or other communication which he was authorized to have with a third party.

5. The Board adopts the views of MacKay, J.A. and finds that the evidence in the form which counsel for the employer seeks to introduce before the Board is not admissible as an exception to the hearsay rule because even assuming (for the purpose of argument) that Mr. St. John was either an employee and/or agent of Local 46 and/or Bill Weatherup, the alleged "admission" was not part of a conversation or other communication which Mr. St. John was authorized by Local 46 and/or Mr. Weatherup to have with Mr. Nicholls, Sr. In view of the ruling of the Board on the first ground it is not necessary for the Board to consider the second ground raised by counsel for Local 46.

6. The objection of counsel for Local 46 is upheld and the hearings in these matters are to be continued on August 8, 1989.

0595-86-R; 0596-86-U; 0828-86-R; 0829-86-U; 1399-86-R; 1400-86-U; 1898-86-R; 1899-86-U Ontario Public Service Employees Union, Applicant v. **The Ontario Legal Aid Plan** under the administration of the Law Society of Upper Canada & Community Legal Education Ontario, Respondents v. The Ontario Association of Legal Clinics ("OALC") and York Community, Interveners; Ontario Public Service Employees Union, Complainant v. Community Legal Education Ontario, The Ontario Legal Aid Plan under the administration of the Law Society of Upper Canada and Ross Irwin, Respondents v. York Community Services, Intervener; Ontario Public Service Employees Union, Applicant v. The Ontario Legal Aid Plan under the administration of the Law Society of Upper Canada and Tenant Hotline Inc., Respondents v. York Community Services, Intervener; Ontario Public Service Employees Union, Complainant v. Tenant Hotline Inc., The Ontario Legal Aid Plan under the administration of the Law Society of Upper Canada and Ross Irwin, Respondents v. York Community Services, Intervener; Ontario Public Service Employees Union, Applicant v. The Ontario Legal Aid Plan under the administration of the Law Society of Upper Canada and Neighbourhood Legal Services, Respondents v. The Ontario Association of Legal Clinics ("OALC") and York Community Services, Interveners; Ontario Public Service Employees Union, Complainant v. Neighbourhood Legal Services, The Ontario Legal Aid Plan under the administration of the Law Society of Upper Canada and Ross Irwin, Respondents v. York Community Services, Intervener; Ontario Public Service Employees Union, Applicant v. The Ontario Legal Aid Plan under the administration of the Law Society of Upper Canada and Injured Workers' Consultants, Respondents; Ontario Public Service Employees Union, Complainant v. Injured Workers' Consultants, The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada and Ross Irwin, Respondents

Related Employer - Union seeking declaration that the Ontario Legal Aid Plan is a common employer with three community legal clinics - Clinics independent of OLAP but are funded by it and are accountable for the proper use of public funds - OLAP found to be engaged in related activities - Common control criteria met because OLAP influenced the management of the clinics - Board exercising discretion to make one employer declaration with respect to two clinics where OLAP had so involved itself in the affairs of the clinics that to ensure meaningful collective bargaining the union needed to be able to negotiate with OLAP

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *J. A. Rundle* and *C. A. Ballentine*.

APPEARANCES: *Elizabeth Lennon* and *Raj Anand* for the applicant/complainant; *Brian Smeenk* and *Ross Irwin* for the Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada and Ross Irwin; *John Page* and *Taivi Lobu* for Community Legal Education Ontario; *Anneli Talvila* and *Judy Welkovitch* for Tenant Hotline Inc.; *John Page* for Neighbourhood Legal Services; *Jean Hyndman* for Injured Workers' Consultants; *Larry Taman* and *Philip Tunley* for Ontario Association of Legal Clinics; *David Cote* and *Joan Milling* for York Community Services.

DECISION OF IAN C. SPRINGATE, VICE-CHAIR AND BOARD MEMBER C. A. BALLENTINE: August 29, 1989

INTRODUCTION

1. These are a number of applications under section 1(4) and complaints under section 89 of the *Labour Relations Act* all brought by the Ontario Public Service Employees Union ("the union"). By way of the section 1(4) applications, the Union requests declarations that the Ontario Legal Aid Plan ("OLAP") is a common employer with four community legal clinics namely: Community Legal Education Ontario ("CLEO"), Tenant Hotline Inc., Neighbourhood Legal Services and Injured Workers' Consultants. Although the section 89 complaints were initially drafted in broader terms, at the hearing the union requested that the Board declare that OLAP and Mr. Ross Irwin, OLAP's Clinic Funding Manager, had breached section 70 of the Act by engaging in intimidation or coercion to compel members of the boards of directors of the respondent clinics to refrain from fulfilling their obligations under the Act.

2. The hearings in this matter took approximately 25 days to complete. A number of individuals were called as witnesses and several hundred pages of documentary evidence were filed. This decision does not purport to set out all of the evidence. We have, however, sought to summarize the main points of evidence.

3. At the commencement of the hearings both the Ontario Association of Legal Clinics and York Community Services sought standing to intervene in the proceedings. Both organizations indicated that they could provide relevant information to the Board and both contended that they had an interest in the proceedings because of the possible precedent setting nature of the section 1(4) applications. The request of that the two organizations that they be given standing to intervene was supported by OLAP but opposed by the union. In that neither York Community Services nor the Ontario Association of Legal Clinics would be directly affected by any determination the Board might make in these proceedings, by way of an oral ruling a majority of the Board (Ms Rundle dissenting) denied their request for standing. The majority did note that if the parties to the proceedings were of the view that officials of the two organizations could provide information relevant to these proceedings, those individuals could be called as witnesses. During the hearing Ms Joan Milling, the executive director of York Community Services, was, in fact, called as a witness.

4. Most, if not all, of the clinics named as respondents sought, but were denied, extra funding from OLAP to pay for legal counsel to represent them. Three of the clinics retained counsel, but dispensed with counsel's services part way through the hearings because of a lack of funds. All of the clinics indicated to the Board that they are opposed to being declared to be a common employer with OLAP. Injured Workers' Consultants took the position that OLAP had, in fact, interfered with its operations but contended that the Board should remedy the situation by simply directing OLAP to cease and desist from any further interference.

OLAP AND THE CLINIC SYSTEM

5. OLAP is administered by the Law Society of Upper Canada ("The Law Society") pursuant to the *Legal Aid Act*. OLAP's operations are overseen by two committees of the Law Society. One committee, the Legal Aid Committee, is responsible for the provision of legal aid through means other than community clinics. This includes a program by which OLAP provides low income individuals with a certificate which entitles them to select a lawyer whose fees will be paid by OLAP. The other committee of the Law Society is the Clinic Funding Committee. This Committee oversees the distribution of OLAP funds to the various community legal clinics.

6. The clinic system came into being in response to a recognition that the program which enables an individual to retain a member of the private bar pursuant to an OLAP certificate does not meet all of the legal needs of the poor. The certificate program generally applies only to legal issues of a "serious" nature. This limitation fails to take into account the fact that for the poor issues such as landlord-tenant disputes and an individual's entitlement to social security benefits can be of major importance. Further, many of the issues of particular concern to the poor fall outside the areas of law generally practiced by members of the bar. Frequently the issues involved do not actually require the direct involvement of a lawyer, but can be handled by a knowledgeable lay person with ready access to legal advice.

7. The first community legal clinics were established outside the legal aid framework. Most received their funding from a variety of government and charitable sources. In 1976 the Provincial Government passed legislation providing for the funding of community legal clinics by OLAP on a systematic on-going basis. This funding allowed for a rapid growth of the clinic system. New clinics were established to meet the needs of communities which had not been served by the original clinics. At the commencement of these proceedings, 52 clinics were being funded by OLAP.

8. The original clinics, including the four involved in these proceedings, benefited greatly from OLAP funding. It not only provided them with more money, but also gave them access to a constant flow of funds. The clinics ceased to be dependent on a series of ad hoc grants from a variety of sources. One negative result of OLAP funding, however, was that grants from non-OLAP sources began to be cut back. Other donors increasingly adopted the position that because the clinics were now being funded by OLAP, their clinic grants could be diverted to other worthy causes.

9. As noted above, Ms Joan Milling, the executive director of York Community services, was called as a witness. Ms Milling testified that in addition to serving as a community legal clinic, York Community Services provides a wide-range of medical and social services to its clientele. These non-legal services are supported by funds from a variety of sources, most notably the Ministry of Health, the Ministry of Community and Social Services, the Ministry of Corrections, the Ministry of Housing, the Federal Immigration Department, the City of York and the Municipality of Metropolitan Toronto. OLAP points to York Community Services as an example of a clinic which receives substantial non OLAP funds. It appears, however, that the funds utilized for the legal aspects of York Community Services operations come primarily, if not exclusively, from OLAP. More importantly for the purposes of these proceedings, the clinics which are party to these proceedings neither provide the same range of services nor have the same outside funding sources as does York Community Services.

10. Apart from clinics connected with a law school, for a clinic to be funded by OLAP, its operations must be overseen by a volunteer board of directors. Most clinics employ at least one staff lawyer, as well as a number of lay persons classified as community legal workers. At one time there were twice as many community legal workers as lawyers employed in the clinic system, although the numbers of each are now about equal. Certain of the early clinics operated as "collectives", whereby no one individual was responsible for the day to day management of the clinic. Over time, however, many of these clinics adopted a management structure whereby a director, who was often a lawyer, became responsible for managing the clinic's operations.

11. An underlying premise of the clinic system is that each clinic will be "independent" and thus able to provide independent legal advice to its clients. The regulation under the *Legal Aid Act* which governs the funding of community legal clinics defines a clinic eligible to receive funding as follows:

'clinic' means an independent community organization providing legal services or para-legal services or both on a basis other than fee for service.

The regulation does not define the term "independent". The regulation does indicate, however, that the independence of each clinic is not absolute, since each is accountable for the proper use of the public funds which it receives.

12. In a 1978 study of the clinic system, Mr. Justice Grange concluded that clinics should remain free from any governmental control and be allowed to run their affairs like a private law firm, subject only to the duty to account for public funds and the competence of the services they render. In this regard, he commented as follows:

The boards must continue to govern the affairs of the clinics, both as to policy and administration, subject only to accountability for the public funds advanced and for the legal competence of the services rendered. The public which advances the funds for the delivery of legal services has a legitimate interest in ensuring that they are spent for that purpose and that the services rendered are of an acceptable professional level. I think the matter should be viewed in this light. The boards have control over the operations of their clinics and the committee may interfere in that control only if it can bring the interference within one or other of the public's legitimate spheres of interest.

The above statement appears to be generally accepted by all of those involved in the operation and funding of the clinics. There is, however, considerable disagreement as to the point at which concern for the appropriate use of public funds justifies the involvement of OLAP in the administration of a particular clinic. A decision of the Divisional Court set out later in this decision suggests that for the purpose of ensuring that public funds are being properly spent, OLAP is entitled under the clinic funding regulation to involve itself in the internal affairs of a clinic provided it does not thereby interfere with the independence of the clinic in rendering or delivering quality legal services to the community.

THE FUNDING PROCESS

13. As noted above, in matters relating to the clinic system, the Law Society acts through the Clinic Funding Committee. Pursuant to the regulation referred to above, this committee is responsible for establishing policy and guidelines with respect to the funding of community legal clinics. Routine matters relating to clinic funding are handled by the "clinic funding staff", all of whom are employees of the Law Society. Initial funding decisions are made by the clinic funding staff, but they can be appealed to the Clinic Funding Committee either as of right or, in some cases, only with leave of the Committee. Mr. Ross Irwin, the clinic funding manager, is the senior member of the clinic funding staff.

14. Funds for the clinic system are provided by the Ministry of the Attorney General and it is the Attorney General who determines the amount of money allocated to the clinic system each year. Funds allocated by the Attorney General are for the clinic system as a whole, and not for specific clinics. The amount allocated to each clinic is ultimately determined by the Clinic Funding Committee.

15. The funding process for individual clinics commences with the clinic submitting an application for funds in January of each year. The application must include a detailed breakdown of the clinic's activities during the preceding fiscal year. This includes a report on the number of clinic files which involved a staff member representing a client before a court or tribunal. The courts and tribunals in question must be listed. Also required is a report on the average caseload of clinic lawyers and community legal workers as well as a breakdown of files into the various areas of law involved. An application for funds must also include a list of the clinic's board of directors with

their respective occupations and an indication of which board members come from the client community served by the clinic. The staff of the clinic are to be listed by name and position, along with the salary he/she is receiving.

16. The clinic funding staff reviews each application, and in connection therewith generally meets with the clinic's board of directors in February or March. The clinic funding staff then prepares a funding decision setting out the proposed funding of the clinic for the next fiscal year. Certain general terms and conditions, which apply to all clinics, will be made conditions of funding. Special terms and conditions may also be included. The Board of a clinic may either accept the decision of the clinic funding staff or seek to appeal the matter to the Clinic Funding Committee.

17. A specific portion of the funds allocated to each clinic is designed to cover personnel costs. Other OLAP funds cannot be used for personnel costs. Personnel funds are allocated pursuant to a formula which takes into account the number of lawyers, community legal workers and support staff positions at the clinic funded by OLAP, as well as the experience of the individuals occupying those positions. Although a clinic receives a set amount of money attributable to each staff member, the clinic is not required to actually pay that sum to the staff member in question. Rather, personnel funds are provided to the clinic as a "pool", and it is up to the Board of Directors to allocate funds to specific individuals. Variations exist in the amount paid to staff members at the different clinics. For example, in 1985/86, the starting salaries for new employees across the clinic system had a range of \$15,000 to \$20,000 for support staff; \$17,500 to \$25,225 for community legal workers and \$20,000 to \$25,750 for lawyers.

18. Although personnel funds are provided to clinics as a "pool", a general term and condition imposed on all clinics is that personnel funds which otherwise would be surplus as a result of staff vacancies not be spent without OLAP approval. The purpose of this term and condition is to ensure that clinics not divide up surplus funds among the remaining staff as a bonus or retroactive pay increase. A clinic may request funds to hire additional staff. In support of such a request the clinic must include a job description for each existing member of its staff, job descriptions for the additional staff requested and revised job descriptions for existing staff should new staff be added. In assessing requests for new staff, a prime concern of the clinic funding staff is to balance the relative needs of different clinics in different parts of the province.

OLAP POLICIES AND GENERAL TERMS AND CONDITIONS OF FUNDING

19. One of the general terms and conditions of funding imposed on all clinics is that its board of directors develop and maintain a procedure for investigating complaints against the clinic. Such complaints can come from a client of the clinic, a party adverse in interest to a clinic client or a member of the public. The clinic's complaints procedure must accord with a complaints procedure policy set by the Clinic Funding Committee. A clinic is required to advise a complainant that if not satisfied with the clinic's disposition of a complaint, he/she can request that the matter be investigated by the Clinic Funding Committee. The Clinic Funding Committee's procedure empowers it to receive submissions or conduct a hearing with respect to any complaint against a clinic. The Committee may then make recommendations to the clinic with respect to the complaint, but the Committee may not actually alter the disposition of complaint by the clinic. The committee's procedure provides that if the Committee is not satisfied with the clinic's disposition of a complaint, the Committee shall so notify the clinic's board of directors and provide it with notice that its future funding may be jeopardized by reason of the clinic's disposition of the complaint.

20. Another general term and condition relates to the financial eligibility of clients. This is aimed at ensuring that clinics generally limit their services to low income individuals. Each clinic is required to adopt financial eligibility guidelines which must not exceed a maximum set by the

Clinic Funding Committee. A clinic may provide services to an individual who does not meet the financial eligibility criteria set by the Clinic Funding Committee, but if it does so it must subsequently file a report with OLAP relating to the incident.

21. A general term and condition of funding is that the ownership of capital assets utilized by clinics, such as office equipment and typewriters, be vested in the Law Society. In 1984, following a survey relating to the needs of the various clinics for word processing equipment, OLAP invited bids from various supply companies and then decided what equipment to purchase. OLAP also decided which of the clinics would obtain word processors. Leased assets are leased by the clinics concerned, although OLAP may require that it negotiate the leases. In 1983 CLEO was asked not to renew a rental agreement for a postal meter without first discussing the matter with the clinic funding staff.

22. Because certain clinics were only open to the public for brief periods each day, in 1985 the Clinic Funding Committee set an hours of access policy which requires that clinics be open to the public seven hours a day, Monday to Friday. The only stated exceptions are for statutory holidays and up to four hours per week for staff training and meetings. When testifying in these proceedings, Mr. Irwin indicated that the clinic funding staff regarded holidays other than statutory holidays as coming within the exceptions.

23. Each clinic receives funding for employee fringe benefits based on a percentage of its salary pool. The percentage is somewhat higher for the relatively small number of clinics which do not take advantage of a group benefits plan for employees paid for directly by OLAP. This policy includes medical and dental coverage, a long term disability plan as well as life insurance. Among the clinics which have not opted into the plan are the those connected with a law school since their employees are covered by a university plan, as well as York Community Services which has its own group plan. At the time of the hearings into these proceedings, OLAP was investigating the establishment of a pension plan which individual clinics could decide to opt into or not. On September 23, 1986 Mr. Irwin turned down a request by the union that it be directly involved in designing the pension plan. Mr. Irwin indicated that the clinic funding staff had decided to ask the Ontario Association of Legal Clinics to constitute a group of clinic representatives for consultation purposes, and that any participation in the consultation process would have to be done through that group.

PERSONNEL POLICY GUIDELINES

24. In the majority of cases, clinic employees are not represented by a trade union. The Ontario Public Service Employees Union represents employees, other than lawyers, at some 12 clinics, including the four involved in these proceedings. The union was certified to represent the employees of Neighbourhood Legal Services in 1980, Tenant Hotline in 1982 and CLEO in 1984. The union acquired its bargaining rights with respect to the employees of Injured Workers' Consultants by way of a successor trade union declaration in 1980. Employees of at least one other clinic are represented by the United Steelworkers of America, while those at York Community Services are represented by the Canadian Union of Public Employees. In each case, the employer is the individual clinic, and the union involved obtained its bargaining rights by reference to a bargaining unit comprised only of employees at that one clinic.

25. The evidence indicates that there has been remarkably little conflict between the union and the various clinic boards of directors. Generally, the boards have been desirous of paying their employees as much as possible, subject to the constraints imposed by their limited budgets and the fact that funds designated by OLAP as non-personnel funds cannot be used for personnel purposes. A number of clinics have agreed to provide their staff with paid leaves and holidays more generous than those found in most collective agreements. It appears that these benefits have been

viewed by the clinics and the union as one way by which the clinics can partially offset their inability to pay higher wages.

26. In 1983 the Clinic Funding Committee became concerned that some of the clinics were providing overly generous benefits to their staff. At the Committee's direction, the clinic funding staff developed a draft personnel policy. In January of 1984 the Clinic Funding Committee circulated the draft personnel policy to all of the clinics and requested their reaction to it. At the same time, the Committee noted that it was considering making it a term and condition of funding effective April 1, 1985 that all clinics comply with the proposed policy. The Committee required that each clinic specify by April 1, 1984 whether or not it complied with the proposed personnel policy on an item-by-item basis and provide an explanation for any items of non-compliance.

27. The proposed personnel policy was quite detailed, and covered such matters as the hours of work of staff, when staff could be paid overtime, the rate of overtime and the number of vacation days staff could earn each year. Also included in the proposed guideline was a specific list of paid staff holidays, detailed provisions respecting maternity leave, the payment of employees on maternity leave, the accumulation of sick leave days as well as paid and unpaid leaves of absence.

28. The draft personnel policy met with strong resistance from the clinic boards which viewed it as a form of interference with their ability to manage their respective clinics. The draft personnel policy was also opposed by the Union. On March 29, 1984, Ms Rosemary Tait, the president of Local 525 of the Union, forwarded letters to nine clinics where the Local's members were employed, including Neighbourhood Legal Services, Tenant Hotline, Injured Workers' Consultants and CLEO. Part of that letter read as follows:

The local union has traditionally held the position that it is in our interests and in the interests of our clients to support the notion that our employers are autonomous and have exclusive jurisdiction (subject, of course, to the collective bargaining process) to set clinic policy, direct the delivery of service and determine terms and conditions of employment. Many of the Directors can acknowledge that this position has been reflected in collective bargaining. Despite the varying degrees of union staff involvements in policy setting and directing service delivery, we believe that this position has prevailed to date.

The imposition of standard personnel policy flies in the face of the Board's historical and ongoing attempts to remain autonomous, threatens to seriously undermine labour relations in the clinics, and is initiating some reconsideration in the union of the prevailing position that you are our employers.

29. On December 12, 1984 The Clinic Funding Committee wrote to the boards of the various clinics advising them that the Committee had decided not to impose a mandatory personnel policy. It indicated that it would instead issue personnel policy guidelines to be used by the clinic funding staff when assessing the personnel policies of the various clinics.

30. The clinic funding staff subsequently proposed special terms and conditions of funding for five clinics, including Tenant Hotline and Injured Workers' Consultants, where leaves and vacations greatly exceeded those provided for in the personnel policy guidelines. The proposed special terms and conditions covered maternity leaves, sick leaves and statutory holidays. The five clinics all sought leave to appeal the special terms and conditions to the Clinic Funding Committee, but such leave was denied. One of the clinics, namely Community Legal Services (Ottawa-Carleton), negotiated a new collective agreement containing provisions which did not conflict with the special terms and conditions. The other four applied for judicial review of the Committee's decision. They claimed that the special terms and conditions improperly interfered with their independence and would force them to breach their collective agreements with the union. In a decision released August 27, 1986, the Divisional Court dismissed the application for judicial review. The

details of the special terms and conditions imposed on the five clinics, as well as the judgement of the Divisional Court, are set out in full in that portion of this decision dealing with Injured Workers' Consultants.

TENANT HOTLINE

31. Tenant Hotline commenced operations in 1975 prior to the advent of OLAP funding. It was a specialty clinic which provided assistance to tenants, primarily those resident in the City of York. In recent years the effectiveness of Tenant Hotline suffered as a result of a number of factors, including conflict between varying groups within the clinic and an unwillingness and/or inability on the part of its board of directors and senior staff to effectively manage its affairs. The Clinic Funding Committee imposed on a number of special terms and conditions on the clinic, including the terms and conditions relating to personnel matters already referred to. Prior to the end of the hearings into these proceedings, the Clinic Funding Committee determined that it would not continue to provide funding to Tenant Hotline. The clinic then ceased operations. In light of the closing of Tenant Hotline, the applicant did not pursue its application and complaint with respect to the clinic.

COMMUNITY LEGAL EDUCATION ONTARIO

32. Unlike other community legal clinics, CLEO does not provide direct legal representation or assistance to individuals. It was founded in 1974 by a group of law students to provide legal education and information to the public. Its goal was to promote public awareness and understanding of the law as well as to improve public access to the legal system. CLEO developed programs directed to a number of different audiences, including immigrants, women in crises, youth, inmates in correctional facilities, community workers and the general public. Although CLEO produced some "hard copy" literature, much of its programming was delivered through seminars, libraries and the school system.

33. In its early years CLEO received funding from a number of sources, most notably the Law Foundation. It first received OLAP funds in 1976. During the first year that it received OLAP funds, CLEO received approximately 50 per cent of its grant revenue from OLAP, another 25 per cent from the Law Foundation and 25 per cent from other sources. Over the years, however, CLEO became increasingly dependent on OLAP funds. By 1985, 91 per cent of its grants came from OLAP, nine per cent from the Law Foundation and no grants came from any other sources.

34. CLEO's practice of providing legal education and information to a wide range of groups brought it into conflict with the clinic funding staff. The clinic funding staff's concerns were essentially two fold. The first related to the fact that CLEO did not restrict its activities to low income audiences. The second arose out of the view that CLEO's goal of providing legal education to the general public was not reasonable, and that CLEO could best provide public legal education by working with, and providing material for, the community legal clinic system.

35. In 1980 CLEO appealed to the Clinic Funding Committee against a requirement imposed on all clinics that they implement financial eligibility guidelines. The appeal was unsuccessful. In 1981 CLEO and the clinic funding staff agreed that the clinic funding staff would do a general review of CLEO's operations. The impetus for the review came from a concern on the part of the clinic funding staff as to the appropriateness of OLAP continuing to fund CLEO, as well as CLEO's increasing dissatisfaction with OLAP's funding methods. The review was performed by Mr. Irwin, at the time a member of the clinic funding staff. Mr. Irwin produced a 110 page report in which he made a number of recommendations related to CLEO's internal operations. He also recommended that CLEO restrict its OLAP funded programs to low income audiences, that it not

use OLAP funds for its library and school programs and that it adopt a strategy for the delivery of public legal education and information by utilizing the system of community legal clinics. Following the clinic funding staff's review, CLEO began to restrict its operations to three target audiences, namely youth, women and the clinic system.

36. At a funding meeting held in February 1984, Mr. Irwin advised the CLEO board that the level of tangible services provided by the clinic was not acceptable. He contended that although the clinic had targeted the three audiences of women, youth and the clinics, CLEO had not identified any specific legal issues important to the low-income groups within these audiences and was therefore unable to develop specific programs to meet those needs. In response to these contentions, the representatives of the CLEO board contended that 1983 had been largely taken up with shifting the focus of the clinic's operations and the initiation of new programs. Mr. Irwin then indicated that the clinic funding staff would look for more tangible results from CLEO during 1984.

37. Mr. Irwin, accompanied by two other members of the clinic funding staff, met with representatives of the CLEO board on March 21, 1985. During the course of the meeting, Mr. Irwin was given a copy of a collective agreement which had been negotiated between CLEO and the Union. On or about March 28, 1985 Mr. Irwin telephoned Mr. Fyshe, the chairman of the CLEO board, and asked to meet with him and other representatives of the board to discuss the collective agreement. Such a meeting was held on April 3, 1985. At that meeting Mr. Irwin referred to a provision of the agreement which stated that \$7,298 in surplus OLAP personnel funds would be distributed to employees "In the event such funds become available, upon approval by the OLAP". As noted above, any OLAP funds designated for personnel costs which become surplus as a result of staff vacancies cannot be spent without approval from OLAP. Mr. Irwin contended that the collective agreement provision in question reflected an attempt on the part of the CLEO board to circumvent OLAP's policies regarding surplus funds. Mr. Irwin noted that he did not view the matter as a serious problem. This doubtless reflected the fact that without the approval of OLAP, the money could not be distributed to employees. Such approval was never forthcoming.

38. The collective agreement also contained a formula by which salary funds would be distributed among various staff. The formula indicated that the total funds available for salaries would be comprised of OLAP's allocation for personnel costs, a Law Foundation grant and net revenue from the sales of CLEO produced material. Mr. Irwin contended that any revenue from the sale of material should go into programming, not salaries. Mr. Fyshe responded that CLEO had a long-standing practice of using revenue from the sale of material for salaries. Mr. Irwin also expressed concern about a clause in the collective agreement which provided that in the event of staff turnover, a new employee could be hired at a salary of \$2,000 less than the lowest paid employee within the relevant job category. Mr. Irwin regarded this provision as an attempt to provide existing staff with greater salaries at the expense of newly hired staff. Mr. Fyshe, however, insisted that the clause was not designed to establish a ceiling on the salaries of new staff, but rather to set a floor so as to protect their salaries.

39. As indicated above, Mr. Fyshe was the main spokesperson for the CLEO board at the April 3, 1985 meeting. It is clear that in rather strong language Mr. Fyshe rejected all of Mr. Irwin's concerns. According to Mr. Fyshe, he viewed Mr. Irwin's statements about the \$2,000 pay differential as an attack on his personal integrity. Mr. Fyshe wrote to Mr. Irwin on April 10, 1985 and again rejected his concerns about the collective agreement. The collective agreement provisions were not again raised by Mr. Irwin, and according to Mr. Irwin were not a factor in the events described below.

40. On April 16, 1985 a letter from Mr. Irwin, dated April 15, 1985, was delivered to the

CLEO offices. The letter stated that the clinic funding staff had decided that no OLAP funds should be provided to CLEO for the 1985/86 fiscal year. The letter indicated that this decision was based, in part, on the fact that the quantity of materials/programs distributed or implemented by CLEO was below an acceptable level, given the funds available to the clinic. Mr. Irwin further claimed that CLEO's programs and materials appeared to be random, lack focus, be sporadic in implementation and that the quality of materials and programs produced had been below an acceptable level. He also alleged that CLEO continued to direct its services at target audiences and topics not within its financial eligibility guidelines.

41. A CLEO board of directors meeting had previously been scheduled for the evening of April 16, 1985. Partway through that meeting Mr. Irwin and two other members of the clinic funding staff arrived. Mr. Fyshe, the chairman of the CLEO board, indicated that the board members were not in a position to discuss Mr. Irwin's letter. Mr. Irwin replied that he had not come to discuss the letter, but only as a courtesy to the board. Shortly thereafter Mr. Irwin and his colleagues left the meeting. A discussion then ensued as to what course the board should follow. A decision was reached to appeal the decision of the clinic funding staff to the Clinic Funding Committee. The CLEO board also began to organize for the appeal.

42. In May or early June 1985, the Law Foundation announced that it was reducing its grant to CLEO from \$40,000 the previous year to \$25,000, and that in future years it would not be making any grant at all. CLEO had previously used the Law Foundation grant to pay the salary of its executive director as well as part of the salary of one other employee. At about this time, the CLEO's executive director, who was not a lawyer, submitted her resignation. This left CLEO with nine staff, all of whom were now being paid out of OLAP funds. OLAP, however, was providing the money on the basis that it was funding only seven positions.

43. By this point in time, members of the CLEO board and staff had become divided into two groups. One group, which included Mr. Fyshe and Mr. John Friendly, the clinic's staff lawyer and now acting executive director, felt there was some validity in the criticisms being expressed by the clinic funding staff. The other group rejected the criticism and believed that CLEO should continue as before. At a meeting of the CLEO board of directors on June 26, 1985, Mr. Friendly contended that it was unlikely that the Clinic Funding Committee would uphold the proposal to defund CLEO, but given the problems at the clinic the Committee would likely impose a number of special terms and conditions. Mr. Friendly argued that it would be best for CLEO if the terms and conditions were actually written by those involved with the clinic. Mr. Friendly further indicated that based on a discussion between himself and Mr. Irwin, he believed the matter could be resolved through negotiations with the clinic funding staff rather than at an appeal hearing before the Clinic Funding Committee. Following Mr. Friendly's presentation, the CLEO board appointed a negotiating committee to meet with the clinic funding staff. The negotiating committee was comprised of board members Sharon Baker, Doug Brown and Joana Kuris. Ms Kuris was also a staff lawyer at another clinic. The board empowered the committee to advise the clinic funding staff that CLEO was prepared to make the production of materials for the clinic system its most essential activity. Given the clinic's recent history, it is reasonable to assume that the board as a whole was prepared to adopt this position only because the clinic funding staff had decided that CLEO should be defunded.

44. Mr. Irwin and Susan Ellis of the clinic funding staff met with the CLEO negotiating committee on July 15, 1985. Ms Kuris outlined the new position adopted by the CLEO board. Mr. Irwin testified that he was pleasantly surprised with what he heard since it represented a fundamental change for CLEO. In this regard he noted that OLAP had never proposed that CLEO direct all of its activities to the clinic system. During the meeting Mr. Irwin was advised of the decision of

the Law Foundation to reduce and then eliminate its grant to CLEO. There then ensued some discussion as to how this would impact on CLEO's staffing complement. Ms Baker testified that she asked Mr. Irwin if OLAP would provide the money to pay severance pay to any laid off employees, to which Mr. Irwin replied that no funds would be provided for this purpose and that in lieu of severance pay CLEO should provide staff with lengthy notices of lay-off.

45. After at least one more meeting, a draft agreement to settle CLEO's defunding appeal was reached between the CLEO negotiating committee and the clinic funding staff. On or about August 28, 1985 the CLEO board distributed the terms of the draft agreement to its staff. The bargaining unit employees met on September 3rd to discuss the terms. They concluded that CLEO should reject the draft and proceed with its appeal against the decision to defund the clinic. When the members of the CLEO board subsequently met to consider their next step, they were picketed by CLEO staff members. Mr. Fyshe testified that with OLAP contending that they were incompetent managers and the staff now suggesting that they were anti-union, the members of the board, all of whom were volunteering their time, seriously considered closing down the clinic. Rather than doing so, however, they voted not to ratify the proposed agreement but to proceed with the appeal to the Clinic Funding Committee. To cover the possibility that the appeal might not be successful, the board gave conditional notices of termination to the staff effective November 22, 1985.

46. The appeal hearing before the Clinic Funding Committee commenced on October 18, 1985. The hearing did not finish. On the basis of an off the record discussion with Ross Irwin and the Clinic Funding Committee, Mr. Friendly became certain that the Committee was not going to defund CLEO, but that it would impose special terms and conditions on the clinic. By letter dated November 1, 1985 Mr. Friendly advised the members of the CLEO board of his assessment of the situation and enclosed a paper headed up "Future Directions" which he described as setting out proposed special terms and conditions of funding "As CLEO would like them". In his letter Mr. Friendly indicated that the Future Directions document was basically a reworking of the draft settlement earlier worked out between Mr. Irwin and the CLEO negotiating committee, but with some changes to bring the document more into line with CLEO's goals and objectives.

47. A meeting of the CLEO board of directors was held on November 7, 1985. There was a lengthy discussion concerning the Future Directions document during which several changes were made to its wording. Following this, the CLEO staff were invited to attend the meeting. The staff were already aware of the Future Directions document since a number of them had assisted Mr. Friendly in its preparation. A secret ballot vote was held separately among the board members and the staff concerning the acceptability of the document as a basis for negotiating a settlement with the clinic funding staff and/or continuing the appeal before the Clinic Funding Committee. Both groups voted in favour of the document. A copy of the Future Directions document was then forwarded to Mr. Irwin.

48. Mr. Irwin met with Mr. Friendly and Mr. Fyshe on November 15, 1985. At this meeting Mr. Irwin indicated that he was agreeable to accepting the Future Directions document as a basis for settling CLEO's appeal to the Clinic Funding Committee, except that while the document called for the hiring of a managing director, it did not indicate that this position was to be filled by a lawyer. Mr. Irwin was of the view that the managing director should be a lawyer and, failing that, another clinic position should be converted into a position for a second staff lawyer. By letter to Mr. Fyshe dated November 22, 1985, Mr. Irwin proposed that the director/lawyer issue be argued before the Clinic Funding Committee when the appeal hearing recommenced. The Clinic Funding Committee subsequently concluded that while it would be desirable if a new managing director had experience in the practice of law, it would not make this a condition of funding.

49. A condition of the 1985/86 funding certificate issued to CLEO was that the clinic comply with the terms of the Future Directions agreement entered into between its board and the clinic funding staff, as well as certain schedules attached to that agreement. Portions of the agreement and schedules are set out below:

1. CLEO will become the clinic system's central facility for the development, production, and distribution of PLEI (public legal education and information) programs and materials. CLEO will devote, in the manner set out below, its clinic funding resources exclusively to the needs of clinics and their clients.
2. CLEO, as part of the clinic system, will share the same general low-income mandate which governs the affairs of the other clinics in the system. All of the CLEO's services and materials will be directed to the existing and potential clients of community legal clinics.

. . .

8. CLEO will provide the Committee or its staff with special reports. These reports will be appended to its quarterly statements, until March 31, 1987. They will outline, in a format to be agreed upon, the progress made in the following areas:
 - a. production quotas;
 - b. deadlines;
 - c. planning;
 - d. quality of products;
 - e. appropriateness of materials;
 - f. work in progress;
 - g. requests in hand;
 - h. distribution of programs and materials;
 - i. costing.

. . .

1. Restructuring

CLEO will restructure its internal affairs to made the most efficient use of its resources to meet its clinic programming objectives.

50. Following the resignation of its executive director, CLEO had nine staff members. Once a new executive director was hired, the number would be back to ten. OLAP, however, had been funding the clinic on the basis of seven positions. During the settlement discussions, Mr. Friendly and Ms Kuris had pushed to have OLAP permanently fund eight positions. Mr. Irwin had resisted such an arrangement, but so as to ensure that the clinic could immediately hire an executive director, he did agree that OLAP would fund an eighth position until June 30, 1986. With the express intent of avoiding any layoffs, the bargaining unit employees voted to continue to split the current funds among the existing staff. At a CLEO board meeting held on April 16, 1986, Mr. Dan Kellar, a union steward at CLEO, advised the board of the staff's position and formally requested that no staff be laid off. Notwithstanding Mr. Kellar's presentation, at the same meeting the board passed a motion to reduce the staff to seven by June 30, 1986. As it happened, several staff members subsequently voluntarily left CLEO's employ and accordingly no staff members were actually laid off.

51. The CLEO staff concluded that the CLEO board had decided to reduce the staff to seven by June 30, 1986 at the insistence of Mr. Irwin. According to Mr. Ron Bishop, who replaced Mr. Kellar as a union steward, the staff had previously understood that the number of staff would be reduced to seven, but only by attrition and without any time line. Mr. Kellar testified that it was

Mr. Irwin's action in allegedly requiring the lay-off of employees which more than any other consideration led the CLEO staff to request that the union file a section 1(4) application. There is, however, considerable conflict in the evidence as to whether or not the reduction of staff was actually required by Mr. Irwin.

52. The evidence establishes that on a number of occasions Mr. Irwin indicated that in his view CLEO should reduce its staffing levels to the number of positions it was being funded for. Further, a statement of facts filed at the commencement of the hearings by counsel for OLAP stated that it was a condition of the settlement of CLEO's defunding appeal that the number of staff employed with OLAP funds would correspond to the number of positions for which OLAP provided funds by June 30, 1986. Mr. Irwin, however, insisted that such had not been the case. He testified that he had never insisted that CLEO reduce its staff to seven and had never set a deadline of June 30, 1986 for it to do so. According to Mr. Irwin, a number of clinics "squeeze out" additional positions from OLAP funds and the clinic funding staff had never taken any steps to stop them. Mr. Irwin acknowledged that his discussions with the CLEO negotiating committee assumed a staff of seven, but stated that this was because once he had made it clear that OLAP would only permanently fund seven positions, the CLEO representatives themselves worked on the basis that the clinic's staff would be reduced to seven.

53. The evidence of Mr. Fyshe, the chair of the CLEO board, was somewhat unclear on the issue of whether the clinic had been required to reduce its staff. According to Mr. Fyshe, he personally believed that CLEO had too many staff members with the result that staff were being underpaid. He wanted the number of staff reduced to seven. Mr. Fyshe also testified, however, that he understood it to be an implicit part of the settlement agreement that CLEO would reduce its staff to seven. Mr. Friendly, on the other hand, testified that Mr. Irwin had never insisted that CLEO lay off any staff. He stated that this had been a decision made by the CLEO board, and that the CLEO board had also decided that the restructuring should be completed by June 30, 1986. According to Mr. Friendly, at the time the board members were aware that certain staff members would likely be leaving the clinic prior to the June 30, 1986 date. For her part, Ms Kuris testified that it had remained open for the clinic to continue to employ more than seven staff, and that Mr. Irwin's only comment in this regard was that OLAP would only provide funds for seven positions.

54. On the evidence, we are led to conclude that as a condition of settling the defunding appeal, Mr. Irwin did not insist that CLEO reduce its staff to seven by June 30, 1986. We base this decision in part on the evidence of Ms Kuris, Mr. Friendly and Mr. Irwin, three individuals actively involved in negotiating the terms of settlement. We have also relied on the fact that while the settlement agreement covers a range of topics in some detail, it makes no reference to staffing levels. Had staffing levels and a date for meeting those staffing levels been part of the settlement, it seems logical to assume that the matter would have been covered in the agreement.

55. Mr. Irwin proposed that he serve on the hiring committee for CLEO's new executive director. The CLEO board rejected this proposal, although it did invite Mr. Irwin to sit on the committee as a non-voting member. The clinic hired Ms Taivi Lobu, a lawyer, as its new executive director. According to Mr. Fyshe, Ms Lobu has turned out to be "just marvelous". After Ms Lobu commenced working at the clinic, the clinic board established a restructuring committee to oversee the changes required to implement the New Directions agreement. Another committee was established, with representation from other clinics, to assess the requirements of the clinic system for legal material. Since the signing of the New Directions agreement, CLEO has almost completely eliminated its involvement with conferences and seminars and now concentrates on the production of hard copy. In line with the new directions agreement, CLEO has effectively become a central facility for the development and production of public legal educational material for the clinic sys-

tem as a whole. Mr. Irwin and the clinic funding staff are apparently quite pleased with the manner in which CLEO has been fulfilling this role. Mr. Fyshe testified that OLAP's involvement in CLEO's affairs has now been reduced to a minimum.

NEIGHBOURHOOD LEGAL SERVICES

56. Neighbourhood Legal Services serves a low income community within the City of Toronto. It was founded as a collective, and until the events described below functioned without any management staff. It appears that in the late 1970's the clinic's effectiveness suffered as a result of internal strife, and certain staff members who were more concerned about making a social statement than serving the legal needs of the poor. This situation changed somewhat when a number of staff members were dismissed by the clinic's board of directors. Although Mr. Irwin was not on the clinic funding staff at the time of these occurrences, he testified that when he joined the staff in 1980 he formed the impression that in the past the clinic had been "totally bizarre". He also concluded that Neighbourhood Legal Services was one of the weakest clinics in the clinic system.

57. At the time of the events giving rise to these proceedings, NLS employed only one permanent support person. In the result, community legal workers and lawyers were required to perform most of their own secretarial and clerical work. On February 4, 1983 Mr. Irwin wrote to the chair of the NLS board with respect to clinic's application for funding for 1983/84. In his letter, Mr. Irwin stated that the clinic funding staff was concerned that NLS did not employ sufficient support staff to ensure the efficient delivery of legal services. Mr. Irwin advised the clinic board that the clinic funding staff did not intend to take any immediate action with respect to this matter, except to require that NLS prepare a report relating to its use of support staff. The preparation of such a report was made a special term and condition of funding for 1983/84.

58. The clinic funding staff decided to adopt a more activist approach with respect to the operation of NLS following the departure from the clinic of one of its staff members. This employee, who was referred to in the evidence both as Ms Bernadette Maxam and Bernadette Maxam, was a resident of the Regent Park Ontario Housing project. In August of 1978 she was hired by NLS as a community outreach worker. She proved to be a hardworking individual, who knocked on doors, distributed flyers and generally made Regent Park residents aware of NLS's activities. In 1981 Ms Maxam was appointed a community legal worker. Because of difficulties she experienced in analyzing legal problems and communicating effectively in writing, however, Ms Maxam proved unable to function effectively in this position. Notwithstanding that these difficulties were evident throughout both her regular and an extended probationary period, Ms Maxam was made part of the clinic's permanent staff. For a time other staff assisted Ms Maxam with her work, but in or about June of 1983 they indicated to the board of directors that they were no longer willing to do so. After a review of the situation by the board's personnel committee, the board decided that Ms Maxam's employment should be terminated.

59. In subsequent discussions between the personnel committee, members of the clinic staff and Ms Maxam, it was agreed that the appropriate resolution of the situation would be for the board to provide Ms Maxam with references and severance pay equivalent to six months salary, in return for which she would tender her resignation. The board of directors insisted that any implementation of this agreement be subject to approval by OLAP. Ms Cynthia Wilkey, the then chair of the board's personnel committee, testified that this position was adopted out of a concern as to how OLAP might react to the settlement, as well as the fact that if the settlement funds were to be paid as a lump sum, they would have to come from OLAP. The clinic board also decided to seek legal advice from Ms Beth Symes, a solicitor who had previously acted for the clinic.

60. Following the conclusion of the settlement discussions with Ms Maxam, Ms Wilkey con-

tacted the clinic funding staff. On or about July 28, 1983, Ms Wilkey and other members of the board of directors met with Mr. Irwin. Mr. Irwin expressed the view that the entire situation was indicative of inadequate and incompetent management on the part of the NLS board. Mr. Irwin also indicated that OLAP would not approve a six month payment to Ms Maxam unless such a move was supported by a legal opinion from Ms Symes. A written legal opinion from Ms Symes was provided to Mr. Irwin. It indicated that because of the length of time that Ms Maxam had been employed at NLS, the clinic would likely be unable to demonstrate that it had cause to dismiss her summarily for incompetence, and that in the circumstances six months' severance pay was not unreasonable. Mr. Irwin subsequently recommended to the Clinic Funding Committee that OLAP funds be advanced to the clinic so as to allow it to make a lump sum payment to Ms Maxam. The Committee agreed with the recommendation and the funds were advanced to the clinic. Deductions were made from subsequent OLAP payments to the clinic to cover the advance. As a condition of the advance, Mr. Irwin insisted that the position occupied by Ms Maxam be "frozen" and not filled without prior consultation with the clinic funding staff.

61. At about this time, the Clinic Funding Committee directed that an operations review be conducted of the NLS clinic. At a funding meeting held on November 4, 1983, Mr. Irwin proposed that the NLS board establish its own committee to conduct the operations review. He also proposed that the clinic funding staff act as a resource to such a committee and be involved in the development of the committee's agenda, time line and work. In addition to the operations review, Mr. Irwin proposed that changes be made to the staffing at the clinic. At the time there were two vacancies at the clinic in addition to the frozen position formerly held by Ms Maxam. One of the vacancies had formerly been filled by a lawyer, the other by a community legal worker. Mr. Irwin proposed that the position formerly occupied by the lawyer be filled by a lawyer who would also serve as the director of the clinic, and that the second position be filled by a qualified legal secretary. He also proposed that the clinic funding staff participate in the hiring for the two positions and that the hiring of any specific candidates be subject to approval by the clinic funding staff.

62. In a letter to the NLS board dated November 11, 1983 Mr. Irwin repeated the proposals he had made at the November 4th meeting. Part of his letter read as follows:

Hiring Decisions

The clinic funding staff also proposed that two steps be taken by the Board of Directors: hiring a lawyer/Director to fill the position previously occupied by Bev Wise; and hiring a qualified legal secretary to fill the position previously occupied by Sandy MacEachern. We also proposed that the clinic funding staff participate in the hiring for these positions, and that the hiring of any particular candidates be subject to the approval of the clinic funding staff. We recommend that these positions be filled as soon as possible, and in any case not later than February 1, 1984.

While we appreciate that the two hiring decisions outlined above represent fundamental changes in the existing staffing component at the clinic, the clinic funding staff has concluded that the implementation of these changes are absolutely essential as initial steps which must be taken immediately if the general operations review over the next year is to be successful.

63. Subsequent to Ms Maxam's departure from the clinic, the NLS board had set up an organization and structures committee. This committee was charged with both reviewing the reporting arrangements between the board and its staff and also with performing the preparatory work for a full review of the clinic's organization, structure and management. By letter dated December 20, 1983 Ms Nancy Vander Plaats, the then chair of the NLS board, advised Mr. Irwin that the clinic proposed to continue with its plan for its own review with the assistance of an outside consultant. Ms Vander Plaats did note that the clinic funding staff could assist the review by providing information to NLS concerning management models and staffing in other clinics. The

implication contained in Ms Vander Plaats' letter was that apart from providing such information, the clinic funding staff would not have any involvement in the review.

64. In her letter, Ms Vander Plaats indicated that during the course of its proposed review, the clinic would look closely at the staffing suggestions proposed by Mr. Irwin. She advised Mr. Irwin that the clinic had decided to immediately hire a full time community legal worker as well as a lawyer on a six month contract position. This ran counter to Mr. Irwin's proposal that the clinic hire a lawyer-director as well as a legal secretary, that the clinic funding staff be involved with the hiring process, and that any hiring decision be subject to approval by the clinic funding staff.

65. The rejection of Mr. Irwin's proposals by the NLS board brought a quick response from the clinic funding staff. By letter dated January 18, 1984 Mr. Irwin advised the board that the clinic funding staff would initiate its own review of the clinic as part of its consideration of the clinic's application for funding for 1984/85. Mr. Irwin also indicated that the clinic funding staff intended to include a special term and condition in the clinic's certificate that it hire a lawyer/director and a legal secretary effective April 1, 1984. The relevant portion of the letter read as follows:

First, I want to confirm that the clinic funding staff intends to include a special term and condition in your clinic's 1984/85 clinic certificate requiring the Board of Directors to hire a lawyer/Director and a qualified legal secretary, effective April 1, 1984. I am also confirming that this special term and condition will provide that job descriptions for the positions be approved by the clinic funding staff, that the clinic funding staff will participate in the hiring interviews, and that the hiring of any particular candidate for Director will be subject to the approval of the clinic funding staff. I am therefore confirming my request made to you by telephone in December that the Board of Directors not enter into any contractual obligations in this fiscal year for replacement staff for any periods beyond March 31, 1984, in order to ensure that your Board of Directors may implement its terms and conditions of funding for 1984/85 without difficulty.

66. A funding meeting attended by representatives of the clinic funding staff, the NLS board and the NLS staff was held on February 28, 1984. Prior to this meeting, the NLS board had attempted to hire a lawyer on a six months' contract, but because there were no candidates for the position it had hired a lawyer on a permanent basis. At the meeting on February 28th the clinic funding staff indicated that they viewed this action as a demonstration of bad faith on the part of the NLS board. The clinic funding staff then requested that the members of the NLS staff who were present be excluded from the meeting. After the staff members had left, Mr. Irwin advised the the NLS board representatives that in light of both the board's refusal to accept the proposals of the clinic funding staff and its action in hiring a lawyer in the face of the opposition from the clinic funding staff, the staff was not prepared to recommend funding for NLS for the 1984/85 funding year. Mr. Irwin indicated that the NLS application for funds would go directly to the Clinic Funding Committee without any recommendation from the clinic funding staff.

67. Mr. Irwin testified that the decision to refer the NLS funding application directly to the Clinic Funding Committee was not meant as a threat to the NLS board, although he acknowledged that it appeared to have this effect. Ms Wilkey's testified that due to the possibility of the clinic being defunded, the board members present advised Mr. Irwin that they were agreeable to hiring a lawyer/director and to conducting an operations review with the clinic funding staff acting as a resource. In subsequent discussions, an arrangement was worked out for the establishment of a three-person committee. One member of the committee was to be a representative of the NLS board, one a representative of the clinic funding staff and the third a community representative acceptable to both the board and the clinic funding staff. This committee was to develop a "short-list" of candidates for the lawyer/director position, from which the NLS board would choose a lawyer/director. The details of this agreement were set out in a February 29, 1984 letter to the NLS board from Mr. Irwin as follows:

I am writing to confirm the agreement reached between your Board of Directors and the clinic funding staff at the funding meeting on Tuesday, February 28, 1984 concerning the hiring of a lawyer/Director by your clinic, and the procedures which will be followed in that process. Your Board of Directors and the clinic funding staff have agreed that the board of Directors will hire a lawyer/Director for the clinic as soon as is reasonably possible, in accordance with the following procedures:

1. A Shortlist Hiring Committee will be constituted and will be composed of one representative of your Board of Directors, one representative of the clinic funding staff, and one community representative who is acceptable to both.
2. The members of the Shortlist Hiring Committee shall have equal votes on all matters, and the majority vote shall rule.
3. Applicants who are currently staff lawyers at Neighbourhood Legal Services have the right to apply for the position of Director and shall be given full consideration by the Shortlist Hiring Committee, and shall be included on the shortlist if skills and qualifications are higher than, or reasonably equal to, others included on the shortlist.
4. The job description, a list of skills and qualifications for the position, and wording for the job advertisement are to be recommended by the NLS Selection Committee in consultation with the clinic funding staff member of the Shortlist Hiring Committee. Once the Selection committee and the clinic funding staff representative agree on the job description, a list of skills and qualifications for the position, and working for the job advertisement, they shall be approved by the NLS Board of Directors, and thereafter shall be submitted to the Shortlist Hiring Committee for use in recommending candidates.
5. The Board of Directors of Neighbourhood Legal Services will then decide on the hiring of a particular candidate from those recommended by the Shortlist Hiring Committee.

68. As its representative on the shortlist committee, the NLS board selected Mr. Bob Brosius, a board member who is also a chartered accountant. The clinic funding staff representative was Ms Susan Ellis, a member of the staff. The NLS board proposed that Ms Barbara Hall be the community representative on the committee, a proposal accepted by the clinic funding staff.

69. A further funding meeting attended by representatives of NLS and clinic funding staff was held on March 20, 1984. During this meeting, the clinic funding staff proposed that the performance of a general operations review by the NLS board, in consultation with the clinic funding staff, be made a special term and condition of the clinic's funding for 1984/85. The clinic raised no objection to such a condition. The clinic funding staff also proposed that certain other special terms and conditions be included in the certificate. One was that the board of directors ensure that open job competitions be held for any staff vacancies occurring in 1984/85. This proposed condition related to events in February, 1984 when a vacant community legal worker position was temporarily filled by moving the clinic secretary into the position without first advertising the vacancy. The clinic funding staff contended that vacancies in community legal clinics should only be filled following an open job competition.

70. Another proposed term and condition proposed by the clinic funding staff was worded as follows:

Support Staff Arrangements

- a. The Board of Directors shall reclassify one community legal worker position to create a second support staff position in the clinic in 1984/85.

- b. This reclassification shall be implemented no later than July 31, 1984.

71. The clinic funding staff also proposed that the number of clinic staff funded by OLAP be reduced from 8 to 7. The eighth position was the one formerly held by Ms Maxam. The contention of the NLS board was that the position in question should be converted into a support position, which would result in the clinic having two lawyers, four community legal workers and two support staff. The clinic funding staff rejected such an arrangement. It was of the view that the eighth position should be eliminated and that another community legal worker position be converted into a support staff position. This would result in the clinic having two lawyers, three community legal workers and two support staff.

72. The proposed deletion of the eighth position, the proposed special terms and conditions referred to above, as well as a term proposed for NLS and all other clinics that the clinic report on its compliance with the Clinic Funding Committee's draft personnel policy, were all appealed to the Clinic Funding Committee.

73. The shortlist hiring committee reported in or about June 1984 that it had selected two applicants for the lawyer/director position. Both of these individuals were interviewed by the NLS board. Early in August the NLS board concluded that neither of the candidates was acceptable. According to Ms Wilkey's evidence, the board made this decision with "considerable trepidation" because of the clinic funding staff's possible response, but felt they were in a position of having to make a bad management decision or pleasing the clinic funding staff. Mr. Irwin attended at a NLS board of directors meeting held on or about August 23, 1984. At the meeting Mr. Irwin insisted that the board's action in not hiring one of the two individuals put forward by the short list committee was a breach of the agreement negotiated in February. He further stated that in consequence of this alleged breach and the time that had passed, the clinic funding staff would immediately proceed with its own operations review of the clinic to be conducted by Ms Susan Ellis.

74. During the August 23, 1984 meeting, the appeal of NLS to the Clinic Funding Committee, which was then scheduled to be heard on September 12, 1984, came up for discussion. There is some conflict in the evidence as to who raised the matter and what precisely was said. It is clear, however, that there was some reference to the fact that the events relating to the hiring of a lawyer/director would likely be raised at the appeal hearing. According to Ms Wilkey, from this discussion the members of the NLS board formed the opinion that at the appeal hearing the clinic funding staff would request that additional terms and conditions be imposed on the clinic or even that the clinic be defunded.

75. Following the August 23rd meeting, the NLS board decided to seek a legal opinion as to the ability of the Clinic Funding Committee to defund the clinic. To this end, Ms Wilkey contacted Beth Symes. Ms Symes subsequently advised Ms Wilkey that based on a discussion with Mr. Irwin, it was her opinion that the clinic was in "deep trouble", and that it should consider making a deal with the clinic funding staff rather than pursuing its legal options. Ms Symes indicated that Mr. Irwin was amenable to a deal provided a director and legal secretary were hired as quickly as possible. Ms Symes noted that Mr. Irwin was prepared to have the NLS board and clinic funding staff agree on a mutually acceptable candidate for the director position. Ms Symes suggested that Ms Joana Kuras, a staff lawyer at another clinic, might prove to be such an individual.

76. At some point in late August or during September, 1984, the NLS executive committee interviewed Ms Kuras for the position of executive director. Also present at the interview were Ms Symes and, as an observer, Ms Ellis from the clinic funding staff. The two NLS staff lawyers subsequently expressed an interest in being interviewed for the position. One of these lawyers had earlier applied for the job, but had been rejected by the shortlist hiring committee. The other lawyer

had been called to the bar less than a year before. On September 25, 1984 Mr. Brosius, the chairman of the NLS board, wrote to Mr. Irwin to advise him that the NLS executive committee proposed to interview the two staff lawyers that evening, and expressed the hope that Ms Ellis would be able to attend. The letter further indicated that the NLS executive committee would be making a recommendation concerning the hiring of an executive director at a meeting of the clinic's board of directors scheduled for September 27, 1984.

77. Mr. Brosius' letter was delivered to Mr. Irwin's office some time during the day on September 25, 1984. Mr. Irwin's reply to Mr. Brosius was also delivered that same day. In his reply Mr. Irwin stated that the proposed interviews of the two staff lawyers was "not acceptable" and would constitute a breach of the shortlist hiring committee agreement entered into between the NLS board and the clinic funding staff. The letter stated that any further breach of the agreement would be regarded as demonstrating a lack of good faith, "with serious consequences".

78. The evidence does not indicate whether or not the NLS executive committee actually proceeded to interview the two staff lawyers for the executive director position. What is clear is that the NLS board offered the position to Ms Kuras. This resulted in the clinic having three lawyers, one more than it was funded for. The board of directors then terminated the services of the most recently hired staff lawyer. The lawyer was provided with a letter of reference from Mr. Irwin stating that his termination was related to the creation of an executive director position and not based on any negative conclusions concerning his performance as a staff lawyer.

79. In September 1984 Rev. E. Frerichs, an individual with considerable experience in the administration of public service organizations, was elected to the NLS Board of Directors. He was subsequently elected Chairman of the Board. Mr. Irwin had suggested Rev. Frerichs' name to the NLS board after being asked who might be willing to serve as a board member. This was at a time when there was significant turnover among board members. The evidence indicates that no pressure was brought on the clinic to elect Rev. Frerichs to the board. Further, there is nothing in the evidence to indicate that Mr. Irwin ever suggested that Rev. Frerichs be elected chairman of the board. Shortly after his election to the board, Rev. Frerich reached the conclusion that NLS needed to tighten its management structure and that its board needed to claim more freedom from its staff.

80. The NLS appeal against the elimination of one of the positions being funded by OLAP was heard by the Clinic Funding Committee in October or November, 1984. On the basis that the position formerly occupied by Ms Maxam had not been utilized effectively, the Committee dismissed the appeal. It appears that based on the agreement of the NLS clinic to hire a second support person, this matter was not dealt with in the appeal.

81. Ms Ellis prepared an interim report concerning her review of NLS in October of 1984. Her report was critical of a number of aspects of the clinic's operations. This included the fact that individual caseworkers were spending a substantial amount of time performing receptionist duties and doing much of their own typing.

82. At a funding meeting held on February 24, 1986 as well as in a follow up letter dated March 4, 1986, Mr. Irwin expressed the view that the board and staff of the clinic had made great strides in addressing the problems at the clinic. He also commended the clinic for some of its recent work. Mr. Irwin went on, however, to describe as "not acceptable" the manner in which the clinic had been using a word processor. The word processor, which was owned by the Law Society, had been assigned to NLS early in 1986 on the basis that it needed this type of equipment. The equipment was placed on the second floor of the clinic where it was utilized for about two hours in the morning by the clinic's secretary. The secretary worked downstairs on the main floor in the after-

noon. According to Ms Esther Ishimura, the then Vice-President of the union local, the union wanted the word processor placed upstairs because of concerns for the health of anyone sitting in front of it all day and also because the secretary wanted privacy when working on it. Mr. Irwin indicated that unless the situation was remedied, the word processor would be removed from the clinic.

83. In May of 1986, NLS proposed that the matter of the word processor be resolved by OLAP funding an additional position for an intake worker, which would serve to free up the clinic secretary and allow her to spend more time on secretarial duties. Mr. Irwin indicated that no extra OLAP funds would be provided for such a position. In discussions with Mr. Irwin, Rev. Frerichs claimed that part of the problem with respect to the word processor involved certain job descriptions which the clinic had negotiated with the union. Mr. Irwin's reply was that this was a problem the clinic would have to address and that unless the situation improved the word processor would be removed. Mr. Irwin assured Rev. Frerichs that a member of the clinic funding staff would come and evaluate the clinic's use of the equipment before any final decision was made to actually remove it.

84. In early October of 1986 Ms Vaughan of the clinic funding staff telephoned Rev. Frerichs and advised him that she intended to spend two days reviewing the clinic's use of the word processing equipment. This was confirmed in a letter to Rev. Frerichs dated October 8, 1986. Ms Vaughan was, however, denied entry into the clinic to perform the review. Later in October the word processor was moved to the first floor of the clinic. Mr. Irwin was notified of this move. He was also advised that a member of the clinic's support staff was being promoted into a vacant community legal worker position and she, in turn, would be replaced by a qualified legal secretary. On October 28, 1986, the NLS board and the union entered into a memorandum of agreement providing for changes in the work duties of certain employees. The changes were made to enable more effective use of the word processor. Given these events, on November 3, 1986 Mr. Irwin advised the board of the clinic that the clinic funding staff would defer its evaluation of the use of the word processing equipment.

85. Ms Kuras started as the NLS director in November, 1984. In March of 1985, under her direction, the clinic commenced an operations review. The review was conducted by the board and staff of the clinic. Mr. Mike Balkwill of the Ontario Association of Legal Clinics assisted as a resource person and facilitator. It was made a term of the clinic's 1985/86 certificate that the review continue and that progress reports be provided to the clinic funding staff. The review resulted in a number of changes to the clinic's operations. In response to these changes, the clinic negotiated new job descriptions with the union. The clinic funding staff has apparently been increasingly pleased with the operation of the clinic. According to Mr. Irwin, the last two funding certificates issued to the clinic did not contain any special terms or conditions, and that with respect to the 1987/88 funding year, the clinic funding staff did not even require that it meet with the NLS board.

INJURED WORKERS' CONSULTANTS

86. Injured Workers Consultants was originally incorporated in 1971. It is a specialty clinic which primarily represents workers with respect to workers' compensation claims. Except for relatively small sums received as contributions from injured workers and the payment to staff for instructing on workers compensation matters, the clinic is totally funded by OLAP. In his evidence Mr. Irwin agreed that some 95 per cent of the clinic's funds come from OLAP. Ms Rosemary Tait, formerly a community legal worker and administrative coordinator at the clinic, testified that the clinic had attempted to raise money from foundations and various levels of government, but were

consistently turned down when the potential donor discovered that the clinic was already being funded by OLAP.

87. Historically, the staff of Injured Workers' Consultants functioned as a collective. There was no manager, although a community legal worker did serve as a coordinator. The clinic did not have a lawyer on staff. If a community legal worker required legal assistance, he/she utilized the services of duty counsel. The clinic also did not employ a full-time secretary. This meant that the community legal workers spent much of their time performing clerical and secretarial functions. All employees were paid the same wage, regardless of what they were doing or how long they had been doing it. Mr. Irwin viewed the collective structure of Injured Workers Consultants, as well as its lack of a secretary, as among the reasons why, in his view, the productivity of the clinic was below an acceptable level. He also formed the opinion that the lack of a staff lawyer meant the clinic was unable to provide a full range of legal services and that the community legal workers were not being properly supervised.

88. Early in 1984 the clinic's board of directors concluded that it really did need to employ a legal secretary, and requested extra funding so that it could create such a position. On February 24, 1984 Mr. Irwin wrote to the board and advised it that the clinic funding staff was opposed to the clinic receiving any extra money to create a new position. He further stated that the clinic funding staff proposed to make it a special term and condition of funding for the 1984/85 fiscal year that the clinic hire a legal secretary and a lawyer. In his letter, Mr. Irwin set out the proposed special terms and conditions as follows:

4. Staffing Component

- a. The Board of Directors shall alter its existing staffing component of nine community legal workers to a staffing component consisting of one lawyer, seven community legal workers, and one legal secretary.
- b. This alteration of the existing staffing component of the clinic shall be accomplished through attrition at the first available opportunities, and the secretarial position shall be created first.
- c. A staff position shall be deemed vacant and available for conversion in accordance with this term and condition:
 - (i) upon termination, resignation, or dismissal or any existing employee; or
 - (ii) upon the granting of any leave of absence, with or without pay, for a period exceeding one month, other than in accordance with the maternity or sick leave provisions of the clinic's collective agreement.

89. Injured Workers' Consultants sought leave to appeal to the Clinic Funding Committee against the proposed special terms and conditions, and also against the denial of additional funds to immediately hire a legal secretary. The Committee denied leave to appeal with respect to the request for additional funds, but did grant leave with respect to the proposed requirement that the clinic employ a lawyer. By decision dated January 15, 1985, the Committee declined to make the employment of a staff lawyer a condition of funding.

90. As part of the general terms and conditions imposed on all clinics for the 1984/85 fiscal year, Injured Workers' Consultants was required to report on its compliance with the Clinic Funding Committee's draft personnel policy. The clinic filed such a report on or about March 28, 1984. The report indicated that the clinic was not in compliance with many of the provisions of the Committee's draft personnel policy. With respect to eight specific items relating to vacations, statutory

holidays, paid maternity leave, sick leave, unpaid leave of absence and leave for the purpose of standing for election, the report noted that the clinic was in non-compliance because of a conflicting provision contained in its collective agreement with the union.

91. A funding meeting with respect to the 1985/86 fiscal year was held between representatives of the clinic funding staff and the board of Injured Workers' Consultants on February 25, 1985. During this meeting, the clinic funding staff voiced concern about the fact that two staff representatives sat on the clinic's nine member board of directors. The clinic funding staff further indicated that it had been inappropriate for these two staff members to sit in on board discussions and votes regarding the board's ratification of the collective agreement, even though they themselves did not vote. The clinic funding staff also reviewed the clinic's personnel policies and the extent to which they exceeded the Clinic Funding Committee's personnel guidelines.

92. Mr. Irwin wrote to the Injured Workers' Consultants board on March 6, 1985. In his letter he indicated that the clinic funding staff proposed to make it a special term and condition of funding that the clinic not utilize OLAP provided funds to pay for benefits in excess of certain stipulated limits. In this regard, his letter read as follows:

PERSONNEL POLICY

In accordance with the directions of the Clinic Funding Committee, the clinic funding staff has reviewed the personnel policies presently in place at your clinic. As we discussed at the funding meeting, IWC's personnel policies exceed the Committee's Guideline in a number of areas, including:

- Vacations (4 weeks, years 1-4; 5 weeks, years 5-10; 6 weeks thereafter)
- Sick leave (24 days per year, with carry over)
- Holidays (15 days per year)
- Maternity leave (UIC sup. to 17 weeks + 6 mths. leave A 50% full pay, whether or not the employee is eligible for UIC benefits)
- Paternity leave (2 months A 50% full pay or, in the case of a primary caring parent, the same as maternity leave provisions)
- Adoption leave (6 months leave with supp. to UIC to 95% of full salary; or 50% of full salary)

Our overall assessment is that these paid leave provisions greatly exceed the acceptable range contemplated by the Clinic Funding Committee when it adopted the Guideline and accepted the view that some flexibility should be preserved in this area for individual Boards. As we indicated at the funding meeting, the only interest of the Clinic Funding Committee in this area is to ensure that acceptable standards are adopted by Boards of Directors with respect to the expenditure of funds provided by the Ontario Legal Aid Plan. The Ontario Legal Aid Plan has no interest in regulating the actual terms of employment between you Board of Directors and its employees; this area remains a matter entirely within the control of the Board of Directors, and subject to the contractual obligations which it undertakes with its staff, either individually or through the collective bargaining process.

The clinic funding staff has therefore decided to include the following special term and condition of funding in your clinic's 1985/86 clinic certificate:

2. Use of Legal Aid Funds

- a. The Board of Directors shall ensure that funds provided by the Ontario Legal Aid Plan are not used to pay clinic staff on leaves of absence or absent from work, except as hereinafter provided, within the following categories:
 - (i) holidays;
 - (ii) maternity leave;

- (iii) paternity leave;
- (iv) adoption leave;
- (v) sick leave.

b. Notwithstanding (a) above, the funds provided by the Ontario Legal Aid Plan may be used to pay clinic staff on leaves of absence, as follows:

- (i) up to 11 paid holiday days per year;
- (ii) where an employee is eligible for UIC benefits during a maternity leave, up to the maximum payable pursuant to a supplementary unemployment benefits plan approved by the Commission during the 17-week period of UIC entitlement;
- (iii) up to 5 days paid paternity leave.
- (iv) where an employee is eligible for UIC benefits during an adoption leave, up to the maximum payable pursuant to a supplementary employment benefits plan approved by the Commission during the period of UIC entitlement;
- (v) up to 15 days paid sick leave per year.

93. When testifying in these proceedings, Mr. Irwin acknowledged that when the clinic funding staff proposed the special term and condition it did not know how much time the staff at Injured Workers' Consultants had been away from work on leaves or the amount of production lost as a result of such leaves.

94. The collective agreement binding on Injured Workers' Consultants was stated to run from April 1, 1983 to March 31, 1985. The proposed special term and condition was to become effective April 1, 1985, after the stated expiry date of the collective agreement. Having regard to the realities of the bargaining process, however, and the "freeze" provisions of section 79 of the Act, it would have been reasonable to assume that the terms of the collective agreement would continue to be binding on the parties for some period thereafter. It appears that the terms of the agreement actually remained binding on the parties until February 19, 1986 when a new agreement with a term of April 1, 1985 to March 31, 1986 was entered into. This new agreement contained similar provisions to those in the prior collective agreement which conflicted with the proposed special term and condition.

95. Two other clinics which negotiated collective agreements jointly with Injured Workers' Consultants, namely Central Toronto Community Legal Clinic and Metro Tenants' Legal Services, were also faced with the same proposed special term and condition. Similar terms and conditions were also proposed for Tenant Hotline and Community Legal Services (Ottawa-Carleton). All five clinics sought leave to appeal the special terms and conditions to the Clinic Funding Committee. The clinic funding staff opposed the granting of leave. A position paper prepared by the clinic funding staff in April, 1985 in support of its position read, in part, as follows:

- 4. It is submitted that the provision of clinic staff leaves of absence impinges directly on the amount of time available for, and the quality of client services. Thus the CFC's responsibility to the public for the proper expenditure of public funds and the quality of legal services is the basis of its jurisdiction to establish limits on the use of these Legal Aid funds.
- 5. It is submitted that the obligations of the Boards of Directors pursuant to their contractual obligations to employees and pursuant to the *Ontario Labour Relations Act*, do not, in any way, prevent the CFC from exercising its jurisdiction to regulate the use of Legal Aid funds in this way.

96. On June 4, 1985 Mr. Hugh Guthrie, the then chairman of the Clinic Funding Committee, advised Dr. James Meuser, the chairman of the board of Injured Workers' Consultants, that the clinic's request for leave to appeal the proposed special term and condition had been denied. The requests for leave to appeal of the other four clinics were also denied. On July 19, 1985 Dr. Meuser wrote to Mr. Guthrie to advise him that the clinic's board had unanimously voted not to sign a certificate containing the special term and condition pending an application for judicial review. By letter dated September 3, 1985, Mr. Thomas Bastedo, now the chair of the Clinic Funding Committee, advised Dr. Meuser that Injured Workers' Consultants would continue to be funded by OLAP pending the resolution of the judicial review application, but at the 1984/85 rate. Mr. Bastedo also indicated to Dr. Meuser that OLAP funds could not be utilized for the judicial review application.

97. On April 9, 1986 Mr. Irwin wrote to the Injured Workers' Consultants board enclosing the terms of a proposed funding certificate for the 1986/87 fiscal year. Included was a special term and condition similar to that proposed for 1985/86 which the clinic had refused to accept. About this time, there was considerable discussion and correspondence concerning the funding levels for Injured Workers' Consultants and the other three clinics involved in the judicial review. On May 14, 1986 Mr. Irwin advised the board of Injured Workers' Consultants that if the clinic signed the proposed 1986/87 certificate, including the special term and condition, it would receive funding at the 1986/87 level both for personnel and operating costs. Mr. Irwin also indicated, however, that if the clinic decided not to sign the 1986/87 certificate pending the outcome of the judicial review application, it would receive grants to cover its operating costs at the 1986/87 level, but grants to cover its personnel costs only at the 1984/85 level. On or about May 28, 1986 the board of Injured Workers' Consultants advised Mr. Irwin that it was not prepared to sign its 1986/87 certificate pending the outcome of the judicial review application.

98. In a joint factum the four clinics involved in the application for judicial review made the following arguments with respect to their relationship with the union. References to certain legal authorities at the end of each paragraph have been omitted:

36. It is respectfully submitted that the *Legal Aid Regulation* must be read in a manner consistent with the Ontario *Labour Relations Act*, R.S.O. 1980, Chap. 228.

37. With respect to the existing collective agreement, their observance is a statutory obligation on the part of the applicants.

38. It is submitted that the Legislature did not contemplate that the applicants be allowed to enter into collective agreements and then be forced to breach them.

39. Furthermore, the action of the respondents constitutes wrongful direct interference in the pre-existing contractual relationship between the applicants and the Union, by intentionally inducing or procuring the breach of that contract, or preventing or hindering its performance.

40. Where a legislature has desired to create a situation where an employer may be prohibited from paying part of the compensation or benefits provided for in a collective agreement, special statutory authority has been provided.

41. Since the Legal Aid Fund is virtually the exclusive source of funding for the applicant, it is specious to maintain that the conditions herein do not directly regulate the personnel policies of the applicants or preclude them from paying benefits with non-legal aid funds.

42. With respect to both existing and future collective agreements,

(a) It is submitted that it was not the purpose of Part X of the Legal Aid Regulation to draw the respondents into the vortex of collective bargaining between the applicants and the Union. Nor

was it intended to put the respondents in the position of qua-employer. Yet the imposition of the conditions herein would have just those results.

(b) Furthermore, by imposing benefit levels lower than those established in the existing collective agreements, the respondents are effectively fixing those benefits. The respondents are thus attempting to dictate terms of future collective agreements without undertaking the responsibility of collective bargaining.

99. The respondents to the judicial review application, namely the Law Society, The Clinic Funding Committee and The Director of Legal Aid, filed a factum which made the following points:

2/ The argument as to independence

25. It is respectfully submitted that the Respondents have a duty to supervise the use of public funds. It is submitted that the condition in this case carries out that duty. It does not interfere with the clinics' operation of their legal aid work nor with any aspect of their administration other than personnel policies. It is essential to the public interest that there be some limits on such policies.

26. While the Respondents do not have to go so far, it is respectfully submitted that the Applicants' present personnel policies are unreasonable. It is submitted that the Respondents would have been derelict in permitting public funds to be used to fund those policies.

3/ The argument as to collective bargaining

27. It is respectfully submitted that the condition imposed by the Respondents does not affect the Applicants' position with regard to the union. It must be an express or implied term of any collective agreement that the rights negotiated thereunder are limited by the funds available to the corporation involved, where that corporation is funded by the public purse.

28. Further, it is submitted that the union can not argue that the Applicants failed to bargain in good faith when the Applicants are simply complying with a lawful term of their funding:

"The duty to bargain in good faith does not regulate the content of collective agreements, but only the manner in which they are negotiated."

USWA Loc. 13704 v. Can. Industries Ltd. [1976] OLRB Rep 199 (OLRB).

In that case, the Board held that there was no conflict between the duty to bargain in good faith and the obligation to comply with the *Anti-Inflation Act*. (The case is referred to in CED (3d) Volume 18, Part IV, paragraph 198.)

100. The Divisional Court released its judgement with respect to the application for judicial review on August 27, 1986. That judgement is set out in full below:

McRAE J.: (Orally)

This is an application for judicial review of a decision of the committee established pursuant to the regulations under the *Legal Aid Act* wherein the committee set conditions with respect to personnel benefits dealing with members of maternity leave, paternity leave, adoptive leave, sick leave and statutory holidays for the applicant legal aid clinics.

The main thrust of the argument of the applicants is, that the establishment of these conditions is an improper and unlawful interference with the independence of legal aid clinics prescribed by the regulations of the *Legal Aid Act*. We are not persuaded by this argument. Section 150 in Part 10 of Regulation 575 reads:

150.-(1) It is the function of the Committee, and it has power,

- (a) to direct the staff in the administration of this part;
- (b) to establish policy and guidelines in respect of the funding of clinics;
- (c) to review and make recommendations to the Director in respect of applications for the funding of clinics, including such terms and conditions of funding as the Committee considers advisable;

In our view, section 150 gives the committee broad power to set guidelines for the spending of public money by legal aid clinics.

The conditions of the certificates complained of do not interfere with the independence of the clinic in rendering or delivering quality legal services to the community. The respondent committee did not exceed its mandate but merely performed its public duty to ensure accountability of public funds.

We also are not persuaded that the conditions set by the committee would result in an infringement of the *Labour Relations Act* in the present circumstances.

The applicants further submit that the conditions would force a breach of their collective agreement with the Union and refer to the decision of Lord Denning M.R. in the case *Torquay Hotel Co. Ltd. v. Cousins and Others*. The principle of law set out by Lord Denning is as follows:

The principle of *Limley v. Gye* (1853) 2 E. & B. 216 is that each of the parties to a contract has a "right to the performance" of it: and it is wrong for another to procure one of the parties to break it or not to perform it. That principle was extended to step further by Lord Macnaghten in *Quinn v. Leathem* [1901] A.M. 495, so that each of the parties has a right to have his "contractual relations" with the other duly observed. "it is," he said at p. 510, "a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

The clause "no sufficient justification" in our view, is dominant. Here, the act complained of is pursuant to valid legislative authority and is sufficient justification.

For those reasons the application is dismissed.

101. Following the dismissal of the application for judicial review, the board of Injured Workers' Consultants signed a 1985/86 funding certificate containing the special personnel term and condition. The special term and condition did not foreclose the clinic from meeting its collective agreement obligations with non-OLAP funds, but as noted above, OLAP funds account for some 95 percent of the clinic's revenues. Ms Susan Howlett, a community legal worker employed by the clinic, took maternity leave from March 15 to September 15, 1987. Pursuant to a collective agreement provision, once her entitlement to receive unemployment insurance maternity benefits was exhausted, Ms Howlett became entitled to receive a further nine weeks of paid leave. The clinic utilized all of the funds it had obtained from lecturing fees and donations from injured workers in an attempt to cover the extra payments. After about six weeks, however, these funds were exhausted and the payments ceased. Ms Howlett filed a grievance. The board did not dispute her entitlement to additional payments but indicated that it had no funds with which to pay her.

DECISION

102. Section 1(4) of the *Labour Relations Act* provides as follows:

(4) Where, in the opinion of the Board, associated or related activities or business are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions con-

cerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of the Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

103. OLAP contends that its activities are not associated or related to those of the three clinics and, accordingly, section 1(4) can have no application to these proceedings. We disagree. OLAP and the three clinics are involved in providing legal services to the poor. The clinics do so directly. OLAP does so, in part, by providing the clinics with over 90 percent of their revenues. OLAP places conditions on the use of those funds and monitors the activities of the clinics to ensure that the money is not spent for purposes other than those approved by OLAP. These considerations lead us to conclude that OLAP and the respondent clinics are, in fact, engaged in associated or related activities.

104. A second precondition for the application of section 1(4) is that associated or related entities be under common direction or control. In most instances, common direction or control over different legal entities arises from the fact that they have common owners, officers or directors. Common direction or control can, however, also arise in other fact situations. For example, in *Evans Kennedy Construction Limited*, [1979] OLRB Rep. May 388, the major shareholder and manager of a construction company also directed the affairs of a second construction company owned by a close personal friend who knew nothing about the construction industry. The Board found the two company's to be under common direction or control. A similar conclusion was reached in *J. H. Normick Inc.* [1979] OLRB Rep. Dec. 1176. That case involved J. H. Normick, a large woods operator which maintained close control over the operations of a subcontractor retained to cut timber pursuant to a timber cutting licence held by Normick. The Board also found there to be a common direction or control in *Brantwood Manor Nursing Homes Limited* [1986] OLRB Rep. Jan. 9. That case involved a nursing home which contracted with certain outside agencies to perform house-keeping, laundry, maintenance and nursing aid functions but retained substantial control over how the functions were to be performed.

105. In the instant case, the three clinics receive almost all of their revenue from OLAP. This, by itself, does not mean that OLAP and the clinics are under common direction or control. It does, however, mean that OLAP is in a position to influence the management and operations of the clinics. Following an indication from the clinic funding staff that if it did not do so it might be defunded, Neighbourhood Legal Services changed its management structure from a collective to a hierarchical model with a director. To avoid having the clinic defunded, the board of Injured Workers' Consultants signed a funding certificate which effectively required that it apply certain personnel terms it did not agree with. Also in response to the possibility of being defunded, CLEO adopted the view expressed by the clinic funding staff that the clinic should concentrate on the production of hard copy for use by the clinic system. Although a number of board members at CLEO had themselves been in favour of such a move, it was only after clinic funding staff had proposed to defund the clinic that the board as a whole agreed to the change. Given these considerations, we are satisfied the three clinics are, in fact, under the common direction or control of both OLAP and their respective boards of directors.

106. The two statutory preconditions for the Board to make a common employer declaration with respect to the three clinics have been met. Section 1(4), however, leaves to the Board a discretion as to whether or not it will actually make such a declaration. The Board's practice is to exercise that discretion and make a common employer declaration only where there exists a legitimate labour relations rationale for doing so. Thus where a unionized entity has sought to escape its collective bargaining obligations by directing work to a related non-union entity, the Board has made a common employer declaration to prevent the erosion of the union's bargaining rights. See: *Great Atlantic and Pacific Company of Canada* [1981] OLRB Rep. March 386. The Board has also

made a common employer declaration in instances where two or more related entities with separate work forces have been carrying on an integrated operation. The declaration was made in order to ensure a viable structure for collective bargaining. See: *Walters Lithographing Company* [1971] OLRB Rep. July 406. A common employer declaration has also been made to ensure that a union is able to deal directly with a person or company processing real economic control over employees, rather than someone who is their employer in name only. See *J. H. Normick Inc.*, *op. cit.*

107. In the instant case no concern arises about a transfer of work to escape the union's bargaining rights. Further, in that the union was content to acquire its bargaining rights on a clinic by clinic basis, there is also not a concern about viable bargaining structures in the sense of the scope of individual bargaining units. In support of its request for a common employer declaration, the union contends that its ability to bargain wages and benefits at the clinics is restricted by the level of funds they receive from OLAP. The ability of many employers to agree to higher wage levels, however, is conditioned by the level of their revenues, whether they come from a funder or from one or more customers. This factor alone is not, in our view, a sufficient basis to make a common employer declaration. On the facts of this case we also do not view the general conditions of funding and policies that are applied to all clinics as justifying a 1(4) declaration, particularly given that the union did not take the position that OLAP was a co-employer at the time it acquired its bargaining rights. In our view, this case turns on the issue of whether OLAP has so involved itself in the affairs of the respondent clinics that to ensure meaningful collective bargaining the union should be able to negotiate with OLAP as well as the clinics.

108. With respect to CLEO, it is clear that the position adopted by the clinic funding staff together with the threat of being defunded led the clinic's board of directors to decide to shift the clinic's operations away from seminars and conferences towards the production of hard copy for the clinic system. Any resulting impact on personnel matters, however, such as changes to employee job descriptions, was indirect and not directly mandated by OLAP. The detailed concerns raised by Mr. Irwin in April, 1985 with respect to the contents of the newly negotiated collective agreement were vigorously rejected by the chair of the clinic's board and apparently were not a consideration in the clinic funding staff's subsequent determination that CLEO should be defunded. It will be recalled that it was a belief on the part of the union and CLEO staff that Mr. Irwin had insisted that the number of staff at the clinic be reduced by June 30, 1986, even if employees had to be laid off to meet this target, that was largely responsible for the decision to file the section 1(4) application. As noted above, however, we are satisfied that although Mr. Irwin disapproved of the clinic's action in employing a greater number of staff than it was being funded for, apart from refusing the clinic extra funds, he was prepared to allow the clinic to continue to employ extra staff. The decision to reduce the number of staff was made by the CLEO board. Given these considerations, we are led to conclude that although OLAP involved itself with the internal operations of CLEO, this involvement did not impact on personnel and labour relations matters to such an extent as to warrant the making of a common employer declaration.

109. OLAP involved itself in a major way with the internal operations of both Neighbourhood Legal Services and Injured Workers' Consultants. Because of concerns that the clinic might otherwise be defunded, the NLS board agreed to the clinic funding staff's proposal that the clinic cease to function as a cooperative and hire a director. Members of the clinic funding staff were then involved in the hiring process for this position. When the clinic's executive committee indicated that it intended to interview the clinic's two staff lawyers for the position, Mr. Irwin responded that this was "not acceptable". When the services of one of these lawyers was later terminated, he was provided with a letter of reference from Mr. Irwin. OLAP was also involved in such personnel-related matters as the composition of the clinic's staff, the process by which vacant positions were to be filled and the assignment of staff to a particular piece of equipment. At

Injured Workers' Consultants, OLAP, over the ongoing objections of the clinic's board of directors, made it a condition of funding that the clinic follow a number of personnel policies at variance with the terms of its collective agreement with the union. Although this limitation related only to the expenditure of funds provided by OLAP, the reality of the situation was that the clinic would either have to get the union to alter the terms of the collective agreement so as to conform with the conditions set by OLAP, or breach the agreement. When one of the clinic's staff took a leave in excess of the terms set by OLAP, the clinic tried to meet its collective agreement obligations, but was unable to do so. Given the detailed involvement of OLAP in personnel issues at both Neighbourhood Legal Services and Injured Workers' Consultants, we are satisfied that the collective bargaining process would be best served by bringing OLAP into the bargaining process. Accordingly, we are satisfied that OLAP and the clinics should be treated as a single employer for the purposes of the *Labour Relations Act*.

110. At the hearing, counsel for OLAP contended that due to the purpose of community legal clinics and the regulation governing their funding, it would be inappropriate for the Board to make OLAP a common employer. He further suggested that for the Board to do so might result in a clinic no longer being "independent" as required by the regulation. This Board is not charged with the responsibility of interpreting and applying the clinic funding regulation. It is, however, charged with interpreting and applying the *Labour Relations Act*, a statute which governs employment relations at both Neighbourhood Legal Services and Injured Workers' Consultants. Our conclusion that OLAP and the clinics should be declared to be a single employer does not serve to inject OLAP into personnel and industrial relations matters at the clinics, but simply recognizes that OLAP, in the furtherance of its mandate, has already involved itself with such matters. We also note that a declaration by the Board applies only for the purposes of the *Labour Relations Act* and no other.

111. In reaching our decision we have rejected OLAP's contention that the Board should refrain from making a section 1(4) declaration since to do so would expand the scope of the union's bargaining rights to other OLAP employees. We are satisfied that a declaration can be limited to the staff employed at the two clinics in question.

112. We have also rejected the contention of OLAP that the Board should refuse to grant a common employer declaration because of the union's delay in bringing these applications. Instances where the Board has declined to grant a common employer declaration due to delay have generally involved situations where a union has stood by and not sought to protect its bargaining rights while a non-union work force has been assembled and employed over a considerable period of time. The Board has declined to make the declaration on the basis that the employees involved should have a say in whether or not they will be represented by a union. See: *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535. In the instant case, if the union were relying solely on the situation as it existed at the time it acquired its bargaining rights, we would likely decline to make a common employer declaration. This is because had the union made such a request during the course of the certification and/or successor trade union proceedings, the clinics and/or OLAP might have adopted a different position with respect to those proceedings. In the instant case, however, the events which justify the exercise of the Board's discretion to grant a common employer declaration occurred subsequent to the union obtaining its bargaining rights. With respect to the Injured Workers' Consultants, the related employer application was brought a few weeks after the Divisional Court had upheld OLAP's ability to impose a special term and condition with respect to personnel-related matters and the clinic had accepted that term and condition. There cannot reasonably be said to have been any delay at all. At Neighbourhood Legal Services, direct OLAP involvement in personnel matters goes back to at least 1983. We do not, however, believe that the failure of the union to make a related employer declaration at that time

foreclosed it from making a later application based upon OLAP's continuing involvement in personnel related matters. In particular, it is not alleged that OLAP has been prejudiced by the fact the union did not bring an earlier common employer application during or subsequent to 1983.

113. We turn now to consider the section 89 complaints alleging a breach of section 70 of the Act. At the hearing the union indicated that it was pursuing these complaints in the alternative, and only with respect to those clinics for which the Board declined to make a common employer declaration. Section 70 provides as follows:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

There is nothing in the evidence to indicate that either OLAP or Mr. Irwin sought to compel the board members at CLEO, by means of intimidation or coercion, to refrain from exercising their rights under the Act, or from performing any obligations under the Act. In the result, the section 89 complaints cannot succeed.

114. Having regard to all of the foregoing, the Board hereby declares that with respect to bargaining unit employees at Neighbourhood Legal Services, the Ontario Legal Aid Plan Under the Administration of the Law Society of Upper Canada and Neighbourhood Legal Services constitute a single employer for the purposes of the *Labour Relations Act*. The Board further declares that with respect to bargaining unit employees at Injured Workers' Consultants, the Ontario Legal Aid Plan under The Administration of the Law Society of Upper Canada and Injured Workers' Consultants constitute a single employer for the purposes of the Act. In all other respects, these applications are dismissed.

DECISION OF BOARD MEMBER JUDITH RUNDLE; August 29, 1989

1. I dissent from the position taken by the majority. It is my view that this decision is wrong in terms of labour relations policy, wrong in law, and can only result in the closure of the two clinics in respect of which the majority proposes to make a "single employer" declaration. The majority's decision would result not only in the loss of jobs by those employed in those clinics, but the removal of the very important legal services which they provide to the needy communities which they now serve.

2. For the Board to be able to issue a declaration under Section 1(4), the two criteria of the section must exist: the entities in question must be carrying on associated or related activities or businesses; and they must be under common direction or control.

3. The finding of the majority that the Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada and Neighbourhood Legal Services, on the one hand, and OLAP and Injured Workers Consultants, on the other hand, fulfill these criteria is wrong in my respectful opinion. That finding is inconsistent with the legislation and regulation under which the clinics and OLAP operate. It is inconsistent with the findings of the Divisional Court that several clinics including IWC are in fact "independent" from OLAP notwithstanding the key restrictions complained of in this case.

4. OLAP and the clinics operate under the *Legal Aid Act* and the accompanying Regulation. The entire purpose and design of the regulatory framework, as well as the policies of the

Clinic Funding Committee of OLAP, is that they are designed to avoid control of the clinics by OLAP. The regulation provides:

“ ‘Clinic’ means an independent community organization providing legal services or paralegal services or both on a basis other than fee for service.”

The evidence disclosed that this definition of a clinic as an “independent community organization” was inserted in the Regulation after the Report of the Commission on Clinical Funding, by the Hon. Mr. Justice Grange in 1978. That report emphasized that Legal Aid Clinics were in fact independent, and that the Regulation must ensure that they remain so. At p.2 of his Report (OLAP Exhibit #2) he stated:

Section 147 of the Regulation makes provision for the funding of “independent community based clinical delivery systems” and I approve of the term “independent” because it recognizes that clinics are to be free from any governmental control and are to be allowed to run their affairs, in effect, like a private law firm (subject to their duty to account for public funds).”

Again at page 22 of his Report, Mr. Justice Grange stated:

“(c) Role of Governing Board of Clinics: Most of the clinics are indeed community based and community controlled, generally by a Board of Directors elected or drawn from the community served by the clinic. The object is two-fold: first, to give the community, the intended beneficiaries, some control over the delivery of legal services; and second, to involve the deliverers of those services in the affairs of the community....Much of the credit must go to the strong role played in their development and operation by the Boards of Directors. If the movement is to develop and progress with the continuing confidence of the clients, that role must not be eroded. The Boards must continue to govern the affairs of the clinics, both as to policy and administration, subject only to accountability for public funds advanced and for the legal competence of the services rendered. [The passage then continues as quoted at paragraph 12 of the majority decision]”.

5. In my view, a declaration that OLAP and either of these clinics “constitute a single employer for the purposes of this Act “is inconsistent with the Clinic Funding Regulation. The majority, in making such a declaration, is in effect altering the legal relationship between -- and the required separation of -- OLAP and these clinics. This is, in my opinion, beyond our jurisdiction.

6. A clinic cannot be “an independent community organization” while at the same time being bound together with OLAP as “one employer for the purposes of the *Labour Relations Act*. If a clinic is “independent”, it by definition is not under the “common direction and control” of another entity such as OLAP. While one recognizes that these two phrases are found in different pieces of legislation, they nonetheless have opposite or contradictory meanings. Therefore, given that these clinics have been found to be independent and eligible for funding, I do not see how this Board can conclude otherwise.

7. An example of this contradiction relates to the employment of clinic employees under the Regulation, OLAP has no authority to employ anyone who works in a clinic. The Regulation only authorizes the Clinic Funding Committee to have certain Clinic Funding Staff “for the purposes of the administration of this part” of the Regulation (S 4(1)(g) of the Regulation). Yet, the decision of the majority makes OLAP the employer of clinic employees. This in turn would make OLAP responsible for all of the obligations of an employer under the *Labour Relations Act* with respect to clinic employees. These obligations include, recognize the Union, negotiate with the Union, abide by the various collective agreements. These obligations are clearly beyond the jurisdiction and power of the Clinic Funding Committee and its staff under the Regulation. How can this Board have the jurisdiction to require the Clinic Funding Committee or its staff to take on

obligations over and above those given to them by their Regulation. Surely, that would require a change in the legislation.

8. I would support this conclusion with the fact that the Divisional Court of the Supreme Court of Ontario has found, in the case of four clinics, including IWC, that the conditions placed on funding by OLAP were not so intrusive that they infringed upon the clinics independence. (I do not believe there was an application for Judicial Review of the decision.) In its decision, the Divisional Court stated as follows: (Tab. 41, OLAP Book I)

McRae J.: (Orally)

This is an application for judicial review of a decision of the committee established pursuant to the regulations under the *Legal Aid Act*, wherein the committee set conditions with respect to personnel benefits dealing with matters of maternity leave, paternity leave, adoptive leave, sick leave and statutory holidays for the applicant legal aid clinics.

The main thrust of the argument of the applicants is, that the establishment of these conditions is an improper and unlawful interference with the independence of legal aid clinics as prescribed by the Regulations to the *Legal Aid Act*. We are not persuaded by this argument. Section 150 in Part 10 of Regulation 575 reads:

150.-(1) It is the function of the Committee, and it has power,

- (a) to direct the staff in the administration of this part;
- (b) to establish policy and guide-lines in respect of the funding of clinics;
- (c) to review and make recommendations to the Director in respect of applications for the funding of clinics, including such terms and conditions of funding as the Committee considers advisable;

In our view, section 150 gives the committee broad power to set guidelines for the spending of public money by legal aid clinics.

The conditions of the certificates complained of do not interfere with the independence of the clinic in rendering or delivering quality legal services to the community. The respondent committee did not exceed its mandate but merely performed its public duty to ensure accountability of public funds.

We also are not persuaded that the conditions set by the committee would result in an infringement of the *Labour Relations Act* in the present circumstances.

With respect, the majority's decision that IWC and OLAP are under common direction and control is inconsistent with the above noted Divisional Court decision. Given that the Court has verified that IWC remains "independent" within the meaning of the Regulation, despite the restrictions complained of regarding the spending of OLAP funds for certain benefits, I am of the view that the two decisions cannot stand together.

9. In my view, another reason to reject the applications for declarations pursuant to Section 1(4) is that it seems clear that IWC and NLS cannot continue to be funded once such a declaration becomes effective. Mr. Irwin testified that for a clinic to be funded it must be independent. Under the Regulation the Clinic Funding Committee has no jurisdiction to fund a clinic which is not independent. Mr. Irwin and many other witnesses called on behalf of OLAP -- including board members and clinic managers -- testified that the control of labour relations by the clinic boards is a critical element in their ability to manage their respective clinics. If OLAP is to become involved as a co-employer for all purposes under the *Labour Relations Act*, as part of its obligation to negotiate and administer collective agreements, in many aspects of the operation and management of

these clinics Professor M. J. Mossman, a former Clinic Funding Manager, testified that one cannot separate union concerns from other matters. The negotiation of working conditions, salaries, job descriptions and work loads affects the clinic's decisions regarding what activities it can and will undertake. If OLAP were involved in such negotiations, Professor Mossman testified that very little would be left for a clinic to decide on its own regarding the provision of legal services. Mr. Irwin testified that the loss of independence and community control would "raise a serious question as to whether such a clinic remains fundable within the meaning of the Regulation".

10. In my view, it is clear that the two clinics could not be funded because they would no longer be independent. There are two serious results from this conclusion. First, the employees of these clinics would be thrown out of work. Second, the clientele of these clinics -- those who are too poor to be able to pay for these legal services and who are not well served by the Legal Aid Certificate Program -- would be left without the very valuable legal services which these clinics provide.

11. The majority states:

"This Board is not charged with the responsibility of interpreting and applying the Clinic Funding Regulation."

With respect, I disagree with that statement where the interpretation of the Regulation is, as here, necessary in the exercise of the Board's functions. Secondly, the Board must not ignore the practical implications of its decision -- to do so would in my view be a failure to properly fulfill our mandate. In this case there is no question of union avoidance or any anti-union conduct by the respondents and no "mischief" which Section 1(4) is designed to remedy. It is wrong to issue a decision which may ensure and will at the very least put at risk, the impoverished clientele and the staff of these clinics.

12. Section 1(4) was enacted to cure the mischief that results from being unable to identify the employer, and in order to prevent the erosion of union bargaining rights through the shuffling of employees from one corporation to another. The Board outlined this purpose in *Industrial Mine Installations Ltd.*, [1972] OLRB Rep. Dec. 1029:

"Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the *Act*. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So, too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situ-

ations where associated or related legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al.*, [1971] OLRB Rep. 406.

It is these types of situations that the interest of the parties in having the Board treat separate employers as constituting one employer for the purpose of the *Act* became apparent, and it is for that reason that section 1(4) was enacted.” [Emphasis added]

It would seem obvious that the mischief which the Board described in that case does not exist in this one.

13. The Board has in a number of cases described the “usual indicia of control”. In *Ethyl Canada*, [1982] OLRB Rep. July 998, the Board listed the following indicia:

- a) Common share ownership;
- b) Common directors;
- c) Whether the target entity has a financial interest in the unionized entity;
- d) Whether the target entity has lent money to or guaranteed the unionized entity’s debts;
- e) Whether the target entity receives any benefit or suffers any prejudice from the profitability or demise of the unionized entity;
- f) What would happen to the target entity if the unionized entity goes out of business;
- g) Whether the target entity has control over the unionized entity’s employees or their terms and conditions of employment;
- h) Whether the businesses share banking, accounting or legal services, or office space;
- i) Whether there is any interchange of employees;
- j) Common signs or logos in letterhead;
- k) Common office staff;
- l) Whether any particular volume of work is guaranteed.

14. Counsel for the respondent OLAP referred us to various cases where the Board looked at whether Section 1(4) was applicable to subcontracting relationships. These cases are relevant because in a sense OLAP is contracting with each clinic for the provision of legal services, at a certain cost and with certain conditions. OLAP and the clinics annually sign a funding “Certificate”, which is really a contract. The analogy to a commercial subcontracting arrangement is therefore appropriate.

In *Charming Hostess Incorporated*, [1982] OLRB Rep. April 536, the Board stated as follows at p.550:

“The Board accepts that there may be subcontracting relationships which can be characterized as a form of joint venture and could fall within the ambit of Section 1(4). The Board adverted to that possibility in *Ontario 474619 Ltd.*, *Supra*. The more closely the purchaser of employee services controls when, where, how, by whom and at what price the employee services are provided, the more the activities will appear to be under joint control or direction. If at the same time the subcontractor is effectively dominated by the purchaser and it appears that the notion

of a subcontract is introduced not to provide independent managerial and employee skills, but rather a separate "non-union" corporate vehicle which permits the purchaser to have the same work performed in much the same way as before but beyond the ambit of its collective agreement, the Section 1(4) declaration might well be warranted. It was considerations as such as these which appear to have prompted the Board to issue 1(4) declarations in *Donald A. Foley Limited*, [1980] OLRB Rep. April 435, and *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176, even though there was no direct financial ownership of the subcontractor in either case."

In *Caressant Care Nursing Home*, [1984] OLRB Rep. Nov. 50, the Board stated as follows at paragraph 5:

"We recognize that there is in any business relationship, apart from perhaps fixed term contracts, the right of termination of the arrangement by the customer, which as a practical matter, requires a contractor to be more or less responsive to, or at least give full and careful consideration to, any complaints by its customers. The question is, whether on an ongoing basis, the contractor really has taken over control and responsibility for the selection, training and supervision of the employee work force, and is truly independent in making the decisions that it does."

Federated Building Maintenance Company Limited, [1985] Rep. Nov. 1585, the Board stated as follows at pages 1594-1595:

"On the other hand, while many subcontracting arrangements may arguably fall within a literal reading of the language of section 1(4) we do not think the statute was ever intended to collapse the vast majority of *bona fide* subcontracting relationships. Section 1(4) is clearly discretionary and should be applied only where there is clear evidence of the mischief it was intended to avoid.

...Obviously Federated will have to take into account its competitors and the capacity of its customer to pay, and it may choose to adopt a collective bargaining posture emphasizing those themes; but that does not make O & Y the 'real employer' of Federated's employees or warrant the invocation of section 1(4). There can be no confusion in the minds of the employees as to who their employer really is, nor was there when the Union sought certification in 1978, and in succeeding years negotiated several collective agreements directly with Federated."

Paragraph 36 states:

"Because there is considerable competition for the services which Federated supplies, O & Y may have considerable leverage but this is no more than a customer would normally have in a favourable market and is not the kind of control which, in itself, would warrant a 'related employer' declaration under section 1(4) of the *Act*. Nor do we think that much turns on the specificity of the cleaning contract. Detailed contracts of this kind are quite common in the industry, are necessary, given the size and complexity of O & Y's building, and in any event are not analytically different from the kind of detailed contracts found in other sectors of the economy (in the construction industry for example). A degree of functional interdependence is inevitable, and implicit in many subcontracting arrangements. What is significant here is the absence any other *indicia* of relatedness or the mischief which section 1(4) was designed to prevent."

[Emphasis added].

The subcontracting cases boil down to questions of (a) the presence or absence of normal indicia of relatedness or (b) whether the parties *bona fide* intend that the subcontractor shall exercise functional control over its employees; and (c) the presence or absence of the mischief that Section 1(4) was designed to prevent.

15. With respect to the normal indicia of control set out in paragraph 13 above, one must note the following with respect to OLAP and IWC and NLS:

- no common ownership;

- no common directors or offices;
- no common management;
- no common employees;
- OLAP has no authority to appoint and has never appointed anyone to the Boards of IWC or NLS;
- IWC & NLS have no authority to appoint or be involved in the appointment of Clinic Funding staff;
- no common premises;
- no interchange of employees;
- no shared banking, accounting or legal services;
- no indication to the public that the organizations are one entity;
- no common signs, logos or letterhead;
- no transfer of work between the clinics and OLAP;
- no control over the flow or transfer of work by OLAP;
- OLAP receives no benefit nor suffers any prejudice from the viability or demise of a respondent clinic.

OLAP does not control the employees or the labour relations or personnel policies of IWC or NLS. Furthermore:

- OLAP staff does not supervise or direct the clinics' staff in the performance of their work;
- OLAP is not involved in any clinic - union negotiations, nor do clinic boards consult with OLAP in this regard. They may, but do not necessarily, report the content of their final agreements to OLAP;
- OLAP personnel are not involved in grievances or arbitrations at the respondent clinics;
- OLAP staff are not involved in the discipline of clinic staff;
- OLAP staff are not normally involved in hiring clinic staff, and in the exceptional circumstances when they have been involved, it has been in a consultative role only (e.g. sitting on the Short List Hiring Committee which made recommendations to the NLS Board regarding the executive director position, and sitting in as an observer during the interview of Ms Kuras for that position).

16. On the question of financial interest, OLAP has no financial interest in either IWC or NLS in the normal sense of an ownership interest. OLAP does provide each clinic with a considerable amount of money each year. I agree with the majority at paragraph 105, where they state that,

"This by itself, does not mean that OLAP and the clinics are under common direction and control."

17. The majority however assert that OLAP's financial clout puts it "in a position to influence management and operations of the clinic." I see nothing in Section 1(4) which states that the Board may issue a single employer declaration whenever a party in a financially superior position is in a position of influence. If that were the case, every dominant client and every financial institution to which an employer is indebted would be subject to such a declaration. Section 1(4) was not intended to have such a broad sweep.

18. With respect to the parties' intentions we heard much evidence, and received many documents, which demonstrate graphically that the Boards of these clinics and their employees believe passionately in the need to maintain clinic independence and to be as free as possible from OLAP influence and interference. The witnesses were virtually unanimous in that belief, with only some of the unionized employees having changed their views.

Dan Kellar, a Union Steward, was called as a witness by the Union. He stated that the Union had negotiated with CLEO's Board of Directors because they were seen as the employer by the Union and the employees. He stated that it has been important to the Union that each clinic be recognized as an individual employer. He testified that:

"I believe many employees believe it is important for a Board to retain as much authority and autonomy as possible because they were connected with the client. Employees in the system wished to support the autonomy of their Board of Directors."

This is consistent with the Union view set forth in paragraph 28 of the majority decision.

19. The policies of the Clinic Funding Committee also make it clear that OLAP intends to protect and foster clinic independence, rather than control and direct them. In the Clinic Funding Committee policy statement dated May, 1985 (OLAP Exhibit 51) the Committee stated as follows at p.5:

"The Clinic Funding Committee therefore accepts that one of the primary goals of the Committee and its staff is to foster the development of a strong, community-based system of independent legal clinics which deliver high quality legal services....".

At page 12 of the same policy they state:

"The Committee's policy is to meet its overall responsibility for the delivery of these legal services by fostering the development of strong community-based independent legal clinics. The autonomy of individual clinics will be respected to the greatest extent possible without unduly compromising the overall goal of delivering high quality and important legal services in an effective and efficient manner."

20. The Clinic Funding Committee's specific procedures are to the same effect. For example, its Complaints Policy (OLAP Exhibit 9(d)) provides that the Committee may investigate a complaint received from a member of the public regarding a clinic, however the Committee has no power to dictate to the clinic how the complaint should be resolved.

21. The Clinic Funding Committee has a guideline regarding the financial eligibility of clients (they must generally be eligible for Legal Aid). However, each clinic is entitled to promulgate its own financial eligibility guidelines provided that they are not inconsistent with those of the Clinic Funding Committee. In addition, the policy allows a clinic to provide service to clients who do not fall within the clinic's own guideline. Mr. Irwin testified that the policy allows a clinic board,

“absolute discretion” in this regard. They are only required to file an exception report with the Committee. The frequency and stridency with which various clients, including IWC and NLS, reject the suggestions, guidelines or wishes of the Clinic Funding Committee and its staff leaves no doubt that the clinics are well aware of their right and ability to operate independently of the funder.

22. With respect to the presence or absence of the mischief Section 1(4) was designed to prevent, it is to be noted that there is no problem here of readily identifying the employer. There is no question of the erosion of union bargaining rights. The evidence discloses that the Union has had a viable collective bargaining relationship with both IWC and NLS.

23. IWC and NLS are two entities which have their own boards of directors elected by their own members, their own management, employees and internal structures. They can and do decide for themselves what areas of law they will concentrate on, what communities are to be served, the nature of the legal services to be provided, how the clinic is to be organized, the employee complement of the clinic, and the terms and conditions of employment of their respective employees. They are able to obtain funding from other sources for activities or employee benefits which OLAP does not fund. None of these activities are controlled by OLAP. OLAP is operated by its own committees and management and staffed by its own employees.

In my view it cannot be concluded that either IWC or NLS and OLAP are under common control or direction. Any doubt in this regard is resolved by reviewing the normal indicia of control referred to above and by recognizing that the purpose of Section 1(4) is not put into play in these cases.

24. In her final arguments on behalf of the Union, Ms Lennon stated that she was placing primary reliance on the general regulatory framework and the General Terms and Conditions of funding which are included in all clinics' funding certificates.

I agree with the majority decision at paragraph 107 rejecting this argument.

“On the general facts of this case, we also do not view the general conditions of funding and policies that are applied to all clinics as justifying a 1(4) declaration, particularly given that the Union did not take the position that OLAP was a co-employer at the time it acquired its bargaining rights.”

25. Ms. Lennon also stated in her final arguments that she was not relying, to any significant degree, on the anecdotal evidence regarding the various events which took place at the respondent clinics. Given that the Union's primary argument has been rejected and that it abandoned its argument based on the anecdotal evidence of suggested instances of interference in clinic affairs by OLAP, it is curious that the majority's decision is based on such anecdotal evidence, given that the Board rejects the argument regarding the general conditions of funding, the application should be dismissed.

26. The majority state at paragraph 106 that it is the Board's practice to exercise its discretion under Section 1(4) “where there exists a legitimate labour relations rationale for doing so”. I would respectfully submit that I am not aware that the Board has ever stated the basis for exercising its discretion in such broad sweeping terms.

The Board has stated in *Federated Building Maintenance, Supra*, that Section 1(4) “is clearly discretionary and should be applied only where there is clear evidence of the mischief it was intended to avoid”. The mischief on purpose was spelled out in the *Industrial Mine Installations* case quoted earlier. None of the purposes of this section would be fulfilled by issuing declarations in this case.

27. The Board has often stated that it will decline to exercise its discretion where the application has not been made within a reasonable period of time of the knowledge that two or more respondents are closely related (see e.g. *Act Builders (Eastern) Ltd.*, [1979] OLRB Rep. June 465)). In this case the relationship of OLAP to the clinics has not materially changed from the time that the Union obtained bargaining rights. In fact, the evidence was, with respect to NLS, that there is currently less involvement by the Clinic Funding Staff in the affairs of NLS than at any time before.

28. Another reason I respectfully dissent from the Majority Award is that it appears to be based on several findings of fact which I believe are not supported by the evidence.

29. At paragraph 105 the majority state:

"To avoid having the clinic defunded the Board of Injured Workers' Consultants signed a certificate which effectively required that it apply certain personnel terms it did not agree with."

Further reference is made to the personnel policies of IWC at paragraph 109. As set out in paragraphs 30 and 92 of the majority decision, IWC's leave policies were found to "greatly exceed the acceptable range contemplated by the Clinic Funding Committee". These include 4 weeks paid vacation after one year of employment and five weeks after five years; 24 days paid sick leave per year, accumulating from year to year; 15 paid holidays per year; paid maternity and adoption leave; and two months' paid paternity leave. As Mr. Irwin's letter stated:

"...The only interest of the Clinic Funding Committee in this area is to ensure that acceptable standards are adopted...with respect to the expenditure of funds provided by the Ontario Legal Aid Plan. The Ontario Legal Aid Plan has no interest in regulating the actual terms of employment between your Board of Directors and its employees; this area remains a matter entirely within the control of the Board of Directors..."

The term and condition of funding is quoted at paragraph 92 of the majority decision. *It does not require any change* in the clinics personnel policies. Rather it states as follows:

"The Board of Directors shall ensure that funds provided by the Ontario Legal Aid Plan are not used to pay clinic staff on leaves of absence or absence from work, except as hereinafter provided..."

Thus the condition of funding simply specifies the purposes for which OLAP funds may and may not be used. The individual clinic may have whatever personnel policies it wishes, no matter how foolish they might seem to OLAP, so long as they do not use OLAP funds to provide benefits beyond those which it has agreed to fund. As the Divisional Court stated, such a condition does not interfere with clinic independence. The Clinic Funding Committee was simply ensuring that public funds were used responsibly.

30. OLAP did not make it "a condition of funding that the clinic follow a number of personnel policies at variance with the terms of its collective agreement with the Union" (paragraph 109 of the majority award). The Clinic Funding Committee was careful not to do that. In fact, IWC maintained those same benefits in the next collective agreement it negotiated, following the signing of the certificate containing the condition in question. Obviously IWC was well aware they were not required to change their benefit policies.

IWC was free to seek funds from other sources to provide benefits beyond the level funded by OLAP and they did so. We only have evidence of one single case of IWC's inability to meet its collective agreement obligations. This was the case of Ms Howlett who received paid maternity benefits for only six of the nine weeks provided under the Union agreement. As the majority state,

the fact that funds are limited cannot form the basis for a Section 1(4) declaration. The fact is that IWC was never required to, and never did, change any of its personnel policies as a result of anything OLAP did! How then can IWC be said to be under the direction or control of OLAP?

31. The majority state at paragraph 105 that:

“Following an indication from the Clinic Funding Staff that if it did not do so, it might be defunded, Neighbourhood Legal Services changed its management structure from a collective to a hierarchical model with a director.”

NLS board member, Cindy Wilkey, testified that even before Mr. Irwin suggested the hiring of an Executive Director in November 1983, “The Board did have problems with the collective model, but we did not want to do a change abruptly”. She also stated that “The Board was anxious to change the staffing components.” She later testified, “We considered an Executive Director desirable, it would help resolve problems.” Another board member, Eilert Ferichs, who had much experience with public service organizations, testified that shortly after he joined the Board of NLS in September, 1984, he concluded that the Board needed to tighten its management structure to claim more freedom from its staff. The following statements are made in a letter from NLS to Mr. Irwin dated August 23, 1984 ((NLS exhibit E(25))), which is prior to the hiring of an Executive Director and the commencement of any operational review:

“The Board of Directors believes that the prompt hiring of an acceptable Executive Director is one of its most urgent priorities, not only to satisfy the requirements of OLAP, but primarily to more effectively manage the operations of Neighbourhood Legal Services on a day to day basis. We trust that you are not in disagreement with this basic priority

• • •

You have informed us that you are commencing immediately with a management review of Neighbourhood Legal Services. We are pleased that you are assigning a high priority to this review, because of the many important and valuable insights it may offer in the management of NLS. We have supported the idea of management review since it was initially proposed and we look forward to co-operating with Susan Ellis carrying out this review”.

32. Ms Ellis did an interim report in the fall of 1984 but the major operational and management review was carried out internally by NLS commencing in March 1985. It was pursuant to this internal process that the clinic altered its committee structure, reporting relationships and in negotiation with the Union, the clinic job descriptions.

33. With respect to the suggestion of a threat to defund, no such threat was ever made. After the Board rejected Mr. Irwin’s proposals of November 1983, regarding the hiring of an Executive Director and a qualified legal secretary and the process for an operational review, Mr. Irwin stated in his letter of January 18, 1984, that the Clinic Funding Staff would proceed with their review as directed earlier by the Clinic Funding Committee. A review is just that, and there is nothing in it which implied defunding. At the February 28th meeting no threat of defunding was made. Mr. Irwin simply stated that in view of the problems he had experienced with NLS, their application for funding for the next fiscal year would go directly to the Clinic Funding Committee, without any recommendation (either for or against) from Clinic Funding Staff. Such a referral is clearly not tantamount to a recommendation to refuse funding.

34. Ms Wilkey testified that she felt that they were now “under threat of defunding”, she also testified that no one on her Board, including herself, were familiar with the Regulation. Ms Wilkey also testified that they were ignorant of OLAP’s policies on clinic funding. They were also unfamiliar with procedures for appealing to the Committee, defunding procedures and procedures

regarding terms and conditions of funding proposed by the Clinic Funding Staff. Ms Wilkey testified "The process was what we were afraid of", and "We didn't know what implications it would have." At the same Board meeting the Board asked Mr. Irwin to explain the ramifications of referring their application for funding directly to the Clinic Funding Committee. He told them it meant they would have to justify its grant to the Committee on their own. Ignorance of the legal rights of the clinic on the part of the Board members cannot form a basis for any suggestion of a threat of defunding having been made, where one was not actually made or intended.

35. The suggestion that the NLS Board was coerced into agreeing to any suggestion by OLAP does not agree with the history of the relationship between NLS and the Clinic Funding Staff. For example:

- NLS maintained its collective model for a long period knowing that CFS felt it was inefficient;
- NLS decided on its own to dismiss Ms Maxim and negotiated her severance with her;
- NLS rejected the two candidates proposed by the Short List Hiring Committee for the Executive Director position;
- NLS proposed to interview two internal candidates for the position of Executive Director knowing that Mr. Irwin was strongly opposed.

36. Mr. Irwin stated in re-examination that NLS was a good example of a clinic not being required to follow the wishes of the Clinic Funding Staff because "we could not impose our advice".

37. The involvement of the Clinic Funding Staff with respect to the hiring process for the Executive Director, was limited to having one person on the "Short List Hiring Committee". This Committee made recommendations to the NLS Board of Directors, which retained the final authority in the hiring decision. Given that the NLS Board retained the final authority, with respect to both the hiring decision and the job description for the position, the involvement of the OLAP staff member on the search committee can hardly be taken as an element of common direction or control.

38. For all of the foregoing reasons, no purpose would be served by the issuance of the declarations. In my view only a considerable degree of harm and difficulty would result, both to the employees of the clinic and their clients.

0821-88-R Tactix Construction Limited, Applicant v. United Brotherhood of Carpenters & Joiners of America, Local 27, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Construction Industry - Practice and Procedure - Related Employer - Employer filing related employer application in support of its request that the Board reconsider its decision to certify the Carpenters Union - Employer arguing certificate should be revoked because the Labourers Union holds the bargaining rights through its relationship with the related employers - Employer seeking leave to withdraw its related employer application after the release of *Ellis-Don* - Carpenters Union opposing request and asking that Board deal with application on its merits or treat employer's application as if it were the Carpenters' application - Board refusing employer leave to withdraw its application - Application to be heard on its merits

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *Nancy Courtney* for the applicant; *David McKee* and *Tony Bucci* for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD; August 21, 1989

1. The applicant Tactix Construction Limited (hereafter "Tactix") is requesting a declaration under subsection 1(4) of the *Labour Relations Act* that it, together with Mark/Barry Holdings Limited, Stash Investments Limited and Danand Investments Inc. be treated as constituting one employer for purposes of the Act. The application was filed in support of an earlier request from Tactix for the Board to reconsider a decision by which the respondent United Brotherhood of Carpenters & Joiners of America, Local 27 (hereafter "the Carpenters Union") was certified as exclusive bargaining agent for carpenters and carpenters' apprentices employed by Tactix. Two certificates were issued to the union, one for the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario, and the other for all other sectors of the industry in the Board's geographic area #8. Tactix was seeking to have the latter certificate revoked.

2. The certificate should be revoked, Tactix contended, because the Labourers' International Union of North America, Local 183 (hereafter "the Labourers' Union") held bargaining rights for carpenters and carpenters' apprentices employed by Tactix in sectors other than ICI at the time the Carpenters Union made its application for certification. According to Tactix, those bargaining rights are contained in the collective agreement between the Metropolitan Toronto Apartment Builders Association (hereafter "the MTABA") and the Labourers Union (hereafter "the MTABA Agreement") to which Tactix is bound. Tactix does not claim that it had become bound to that agreement by entering into a direct collective bargaining relationship with the Labourers' Union. Rather, it claims that it is bound to the MTABA Agreement because Mark/Barry and Stash had been bound to its 1976 predecessor and Tactix should be treated together with them and Danand as one employer for purposes of the Act.

3. The Labourers' Union, also relying on the MTABA Agreement, sought standing to intervene in the application for certification to make its own request for reconsideration and revocation of the all other sectors certificate and filed an intervention in the application under subsection 1(4) of the Act. The Labourers' Union was asserting that, at the time the application for certification was made, it had exclusive bargaining rights under the MTABA Agreement for

carpenters and carpenters' apprentices employed by Tactix because Tactix, through its relationship with Mark/Barry, Stash and Danand, was bound to that agreement.

4. The Carpenters Union filed a reply to the Tactix application under subsection 1(4) of the Act. The Carpenters Union agreed that Tactix, Mark/Barry, Stash and Danand should be declared as constituting one employer for purposes of the Act, but it requested additional relief as follows:

- (1) that Mark/Barry, Stash and Danand, which are not named either as applicants or respondents, be made respondents;
- (2) that Jilsen Investments Inc. be added as a respondent;
- (3) that the Board declare Mark/Barry, Stash, Danand, Jilsen and Tactix to constitute one employer for purposes of the Act;
- (4) that the Board declare the five corporations to be bound to the carpenters provincial agreement in the ICI sector; and
- (5) that the Board direct the five corporations to meet with the Carpenters Union, bargain in good faith and make every reasonable attempt to conclude a collective agreement with it (for all sectors except ICI in Board area #8).

5. The Board dismissed Tactix' request for reconsideration without a hearing. Tactix requested reconsideration of that decision and a hearing into its application under subsection 1(4) of the Act. The Board's decision had not dealt with or determined either the subsection 1(4) application or the Labourers' Union's request for standing in and reconsideration of the Board's decision certifying the Carpenters Union. The Labourers' Union joined with Tactix in its request and asked that its own request for reconsideration be heard at the same time. However, since the issue of whether the Labourers Union held bargaining rights for carpenters and their apprentices under the MTABA Agreement was before another panel of the Board in proceedings to which both unions herein were parties, Tactix, the Carpenters Union, the Labourers Union and the other corporations agreed to adjourn all matters at issue until the bargaining rights issue was decided in the other proceedings. The issue was decided in a decision which issued December 8, 1988 and is reported in *Ellis-Don Limited*, [1988] OLRB Rep Dec. 1254.

6. The Board in that case found that the MTABA Agreement did not establish bargaining rights for the Labourers' Union respecting carpenters and carpenters' apprentices. As soon as the decision issued, the Carpenters Union requested the Board to list the subsection 1(4) application for hearing. The other parties asked the Board to defer any hearing into the application and into the requests to reconsider and revoke the decision to certify the Carpenters Union until the *Ellis-Don* panel dealt with requests for reconsideration of that decision. Nonetheless, the Board did list for hearing the reconsideration requests and the subsection 1(4) application. The hearing was adjourned on consent of the parties. During the adjournment, the *Ellis-Don* panel refused the requests for reconsideration in a decision which issued March 7, 1989. See *Ellis-Don Limited*, [1989] OLRB Rep. March 234.

7. Following that decision, Tactix and the Labourers' Union requested leave to withdraw their requests for reconsideration herein and Tactix asked leave to withdraw the application under subsection 1(4) of the Act. The Board directed that the reconsideration requests be withdrawn. Tactix' request to withdraw the subsection 1(4) application was supported by the Labourers' Union

and other corporations, but was opposed by the Carpenters Union which asked the Board to refuse the request and to decide the application on its merits either as filed, or by making Local 27, the applicant and Tactix and the other corporations respondents. In these circumstances, the Board listed the application for hearing to allow the Carpenters Union "...to show cause why the Board should determine the application on its merits, or in the alternative amend the application to treat it as an application of [the Carpenters Union]".

8. Counsel for the Carpenters Union submitted at the hearing that the Board should determine the application for two reasons. First, the reply was both its defence against having the Board grant relief to Tactix in the form of a declaration that Tactix was bound to the MTABA Agreement and its claim for the relief referred to above. Counsel acknowledged that the Carpenters Union could have filed its own application requesting the same relief as asked for in the reply and asked to have its application consolidated with that of Tactix. To have done so, counsel contends, would have been a change in form only and would not have altered anything of substance when compared with how the Carpenters Union chose to proceed. Counsel analogized the way the respondent has proceeded with filing a defence to a claim and a counterclaim in a civil proceeding. According to counsel, if the claim was withdrawn or dismissed, the court would still decide the counterclaim. Second, counsel submits that, were the Board to allow the application to be withdrawn without dealing with the Carpenters Union's request for relief, it would be left in a position where it would have to file its own application in order to pursue the relief, creating substantial prejudice to its interests. The prejudice would arise out of two circumstances according to counsel, the appearance of delay in making the application and a claim that the parties to the MTABA Agreement have amended it, ostensibly to make the Labourers' Union the exclusive bargaining agent for carpenters employed by employers bound to that agreement. The appearance of delay to which counsel referred was the lapse of ten months since the claim for relief was made in the reply. The prejudice would be in not knowing how the Board might deal with the lapse of time. With respect to the MTABA Agreement, the prejudice would arise were the Board to find that it had been amended to cover carpenters. Counsel's view of the Board's jurisprudence is that a finding of bargaining rights held by another union at the time a subsection 1(4) application is made would be fatal to the application.

9. Counsel for Tactix argued that the application should not be decided on its merits because there was no longer any valid labour relations purpose for the Board issuing a one employer declaration. There is no mischief in the form of erosion of bargaining rights or undue fragmentation of businesses such as was referred to in *Industrial Mines Installations Limited*, [1972] OLRB Rep. Dec. 1029 which would cause the Board to exercise its discretion, and the Board has stated that its discretion is not to be exercised in every case where the statutory preconditions exist for it to have the discretion to make a one employer declaration. (*Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844, at para. 11.) Counsel submits that there had been a valid labour relations purpose to the application when Tactix made it in conjunction with its request to have the Carpenters Union's certificate revoked. Tactix had claimed that it was bound by means of its association with the other corporations to the MTABA Agreement which contained pre-existing bargaining rights for the Labourers' Union in its certificate. That conflict of bargaining rights was the mischief which Tactix was seeking to have cured by a one employer declaration. The mischief evaporated when the *Ellis-Don* panel found that the MTABA Agreement did not include bargaining rights for carpenters. On the other hand, counsel argues, the facts alleged in the application and reply do not establish any mischief directed at the Carpenters Union on which it could rely to support its counterclaim for relief. This is because the other corporations are inactive and pose no threat to the bargaining rights held by the Carpenters Union. Absent any mischief, there is no ground on which the Board should exercise its discretion to make the one employer declaration and the other directions sought by the Carpenters Union.

10. It is not argued that the Board lacks jurisdiction either to require that the application be heard on its merits or to treat it as though it had been made by the Carpenters Union. It is Tactix' position that the Board should not hear and decide the application or entertain the Carpenters Union's request for relief because there is no valid labour relations purpose to be served by the Board declaring that Tactix and the other corporations be treated as constituting one employer for purposes of the Act. That position is correct with respect to Tactix' own purpose in making the application, but not with respect to the claim for relief of the Carpenters Union.

11. Its reply relies on the facts alleged by Tactix that it, Mark/Barry, Stark and Danand have at one time or another been engaged in construction under common control or direction and that one person has been active in the operations of all four corporations. The Carpenters Union has asked that Jilsen be added as a party and makes the same allegations about it. The claim for relief in the reply is based on the alleged threat to the bargaining rights for Tactix' carpenters and carpenters' apprentices posed by the other corporations which are admitted by Tactix to have carried on businesses in the construction industry and Jilsen which is alleged by the Carpenters Union to be or have been similarly engaged. Had the Carpenters Union brought its own application under subsection 1(4) alleging those circumstances, the Board would not have been prepared to say that the application did not make out a case for the relief sought without first hearing the parties' evidence. Nor would the Board have been prepared to say that the Carpenters Union's claim for relief was without any valid labour relations purpose and should not be heard. Therefore, there is nothing in the union's claim for relief that, of itself, would cause the Board to refuse to entertain it. The question, then, becomes one of whether the Board will allow the applicant to withdraw the application and require the Carpenters Union to formally reapply for the relief it seeks.

12. The Board normally will not refuse a party leave to withdraw an application or complaint unless the proceeding has reached a stage where the Board will dismiss it (for examples of the latter, see the Board's Practice Note No. 7). Nor will the Board insist on an application or complaint being litigated where all the parties are content that it not continue. However, where a party is seeking relief independent of and different from the party seeking to withdraw an application, as is the case here, that request for relief should not necessarily be terminated because the other party is seeking to withdraw its own request. From a practical point of view, it would not make much labour relations sense in this case to grant leave to Tactix to withdraw its application and require the Carpenters Union formally file its own application. That would only delay matters and expose the union to the risk of the potential prejudice referred to in the submissions.

13. Therefore, in these circumstances the Board will not grant leave to Tactix to withdraw its application and it will allow the Carpenters Union's request for a hearing into its own claim for relief as set out in its reply to the application. To do so is consistent with the purpose of section 31 of the Board's Rules of Procedure which states:

Subject to the giving of notice and the provision of particulars, nothing contained in sections 27 to 30 shall prevent an applicant from claiming relief under subsection 1(4) of the Act in any proceeding under the Act.

This would allow a respondent to an application under subsection 1(4) to claim relief under the subsection independent of any relief the applicant may be seeking.

14. The Board finds it unnecessary at this time to decide which party or parties are to be treated as applicants and respondents. If it is a matter of dispute, or if there is any dispute about which party or parties has or have the burden of adducing "... at the hearing all facts within their knowledge that are material to the allegation" that Tactix and one or more of the other named cor-

porations are or were under common control or direction, the parties can make their submissions on that issue at the hearing.

15. In the result, in all of these circumstances, the Board will proceed as follows. The application will be listed for hearing by the Board on its merits. While employees of Tactix and the other corporations were given notice of the application, they were not given notice of the separate claim for relief made by the Carpenters Union. Therefore, the Board will fix a new terminal date for the application and employees will be given notice of the application, of the claim for relief made by the Carpenters Union and of the hearing into the application.

16. Accordingly, this application is referred to the Registrar for the fixing of a terminal date, for the serving of notice in Form 32, together with a copy of this decision, on the applicant, respondent, intervener and each of the following:

Danand Investments Inc.,
Jilsen Investments Inc.,
Mark/Barry Holdings Limited,
Stash Investments Limited;

and for the serving of notice in Form 33 on the employees of:

Danand Investments Inc.,
Jilsen Investments Inc.,
Mark/Barry Holdings Limited,
Stash Investments Limited,
Tactix Construction Limited.

The notice in Form 33 is to include notice of the claim for relief made by the Carpenters Union.

1915-88-R; 1916-88-R; 1917-88-R Sandra Taylor, Applicant v. United Food and Commercial Workers International Union, Local 175, Respondent v. **Thorold I.G.A Market**, Intervener v. Group of Employees, Objectors; Sandra Taylor, Applicant v. United Food and Commercial Workers International Union, Local 633, Respondent v. Thorold I.G.A Market, Intervener v. Group of Employees, Objectors

Evidence - Parties - Petition - Termination - Union relying on the labour relations environment in the workplace in attacking the voluntariness of the petition to terminate the union's bargaining rights - Board hearing evidence but finding it of no relevance - Labour relations background only of relevance in an exceptional case where there is a pattern of notorious illegal anti-union conduct by employer - Whether an employee in one unit can apply to terminate union's bargaining rights in two other units - Board finding that applicant having status to bring applications - Votes ordered

BEFORE: Michael Bendel, Vice-Chair, and Board Members W. H. Wightman and P. V. Grasso.

APPEARANCES: Liam Rafferty, Frank D'Alessandro and Sandra Taylor for the applicant; Michael

A. Church, C. W. Richardson and Patricia Huellon for the respondents; *Kinnear Carrick and John Pachereva* for the intervener.

DECISION OF MICHAEL BENDEL, VICE-CHAIR AND BOARD MEMBER W. H. WIGHTMAN; August 24, 1989

1. These are three applications under section 57 of the *Labour Relations Act* for declarations that the respondents no longer represent the employees of the intervener in the bargaining units for which they are bargaining agents. By agreement of the parties, the three applications were heard together.

2. There are two contested issues raised for the Board's consideration in these applications. The first is whether the evidence discloses that the employees who signed the petitions in support of the applications did so voluntarily. The second issue is whether the applicant, Sandra Taylor, who is an employee in one of these three bargaining units, could bring applications under section 57 in respect of the other two units.

3. On the question of "voluntariness", counsel for the respondents has argued that the applications do not disclose that the employees who signed petitions in support of the applications did so voluntarily. He has presented essentially three challenges to the applications:

- (a) that there was a very turbulent labour relations environment at the place of work and that we should, as a result, be skeptical about the voluntariness of the petitions;
- (b) that the quality of the evidence concerning the origination, preparation and circulation of the petitions was deficient, and that we could not rely on that evidence; and
- (c) that Sharon Murgich, a supporter of the applications, who played an important role in the circulation of the petitions, was perceived by employees as acting on behalf of, or with the support of, management.

He has argued that, even if we conclude that any of these challenges, standing alone, is insufficient to have the applications dismissed, their cumulative effect is such that we should not accept that 45 percent of the employees in each of the three units have voluntarily signified that they no longer wish to be represented by the respondents.

4. We start our consideration of the case by reviewing the main features of the labour relations environment upon which the respondents rely. The three bargaining units at the intervener's store are composed, respectively, of full-time employees (other than those in the Meat Department), part-time employees, and full-time Meat Department employees. Local 633 represents the Meat Department bargaining unit, Local 175 the other two units. The respondents were certified for the two full-time units in 1981. From then until 1985, relations between the intervener and the respondents appear to have been good; at least there were no strikes, lock-outs, complaints to the Board or arbitrations. In late 1985, during Local 175's campaign to organize the part-time employees, an employee known to be a strong supporter of the union was laid off, only to be reinstated, with some compensation, late in 1986, following a complaint to the Board. In January 1986, Local 175 was certified as bargaining agent for the part-time unit. In the summer of 1986, negotiations for a first collective agreement for the part-time unit broke down. The employees went on strike. Some of the employees in the other two units, who were not in a legal strike position, refused to

cross the picket line. They were fired. The respondent complained to the Board. The intervener also complained to the Board. An application was also made to the Board for first contract arbitration under section 40a of the Act. All of these proceedings were settled between the parties with the assistance of a Labour Relations Officer from the Board, and a first collective agreement was signed in November 1986. Thereafter, labour relations at the store appear to have remained tense. Evidence was presented on several incidents after November 1986:

- (a) The union presented a grievance alleging a 40 cents per hour discrepancy in an employee's pay. It took the dispute to arbitration and was unsuccessful. The employer posted the award on a bulletin board, together with a copy of the arbitrator's statement of account. Someone wrote on the account the words "Was it worth it?". The union suspected that management had done this, but no evidence to that effect was presented.
- (b) The ballot box to be used in an election for union steward in the spring of 1988 was placed in the store manager's office and the store manager handed out ballots to employees. Ms. Taylor, the applicant, was the successful candidate. The union annulled the results of the election as a result of management's role in the election. Ms. Taylor was not successful in the subsequent election. The employer denies that there was any interference in the union's election. The store manager, it says, did not approve of the ballot box being positioned in full view of the customers and simply made an error in judgement in having it taken to his office.
- (c) Two employees were discharged in the summer of 1988 for alleged theft. One of them was a union steward, the other a known supporter of the union. An arbitrator has recently ordered their reinstatement, with a four-week suspension in the case of one of them. Criminal proceedings were still pending at the time of our hearing.
- (d) The union gave notice to bargain for a new collective agreement in October 1988. As of mid-June 1989, the date of the conclusion of our hearing, no bargaining had yet taken place. The employer says that one meeting was cancelled by the union and that a conciliation officer had suggested that bargaining was likely to be unproductive while the present applications were pending.

The applications in this case, it should be mentioned, were filed with the Board on November 8, 1988.

5. Prior to the hearing, counsel for the union gave notice that he intended to rely on the labour relations environment at the store in his attack on the voluntariness of the support for the applications. Despite objections from the applicant and the intervener to the relevance of this evidence, we reserved a decision on its relevance and agreed to hear it. We could not exclude the possibility that it might be relevant to the question of the voluntariness of the petition. In the course of submissions on the admissibility of this evidence, the Board was referred to *K Mart Canada Limited*, [1983] OLRB Rep. Aug. 1338 and *Belleville Plaza*, [1986] OLRB Rep. Sept. 1179.

6. Having heard the evidence and submissions on the labour relations environment and the effect it might have had on the voluntariness of the application, we are now of the view that we

cannot draw any inferences from it or attach any significance to it for the purposes of these applications. The approach that should be taken to evidence of this kind was considered in *Belleville Plaza, supra*. In that case, the Board was asked to draw inferences about the voluntariness of a termination application from events surrounding a lock-out of employees which had ended some eight months before the petition was circulated. At page 1182 of its decision, the Board explained its refusal to draw any inferences from this evidence:

14. In our view as well, little weight can be placed on the events surrounding the lock-out. In refusing to entertain evidence relating to the environment created by a labour dispute, the Board in *Ottawa Journal*, [1978] OLRB Rep. March 291, had this to say:

Counsel for the respondent asks the Board to draw the inference that because of the climate generated by the protracted labour dispute the statement in support of the termination application is not a voluntary one. In so doing the respondent is asking the Board to draw the inference that free expression has been thwarted because of circumstances *not directly related to the origination, preparation and circulation of the statement*. Even if the Board assumes that the respondent can establish the material facts upon which it intends to rely - and indeed a number of these facts are a matter of record having been set out in the Board's decisions dealing with the section 79 (now 89) complaints brought by the parties - the Board would not be prepared to draw the inference which the respondent suggests.

[emphasis added]

In a similar context, the Board in *Ontario Hospital Association (Blue Cross), supra*, noted that "if the employers actions overstep the bounds of lawful conduct, or are considered to be something other than they appear, the trade union has its remedies."

15. The petition before us was circulated approximately eight months after the lock-out ended. The Board finds there is nothing in the evidence which suggests that the actions of the employer had as their objective the origination of a termination application, or prevented employees from making up their own minds on union representation...

The *K Mart Canada Limited* decision, *supra*, relied upon by the respondents, while a termination application, was a case of a very different kind. As the Board noted, at page 1339 of its decision,

It is a matter of public record and is common knowledge among bargaining unit employees that, over an extended period of time, the respondent employer has engaged in a series of egregious violations of the *Labour Relations Act* in respect of the bargaining unit to which this application pertains.

The Board concluded that it could not ignore the impact of this employer conduct on the voluntariness of the petition. In particular, the Board was of the view that, in those circumstances, employees would likely have expected the employer to know which of them had signed, and which of them had not signed, the petition. At page 1342, the Board said the following:

10. While it is clearly not appropriate for the Board to visit the sins of an employer on its employees, who may have legitimate reasons for wishing to terminate the bargaining rights of a union which has been detrimentally affected by the employer's contraventions of the *Labour Relations Act*, a pattern of pervasive and notorious breaches of the Act such as that outlined above is a factor which cannot be overlooked by the Board if it is to realistically assess the voluntariness of a petition arising out of that context. To disregard that background would be to ignore the labour relations realities of the situation. However, that background is but one of several factors which have led the Board to conclude that this application should be dismissed.

7. The primary focus of the Board in a termination application has to be whether employees who signed the petition did so voluntarily. If there have been violations of the Act by the employer, the union or employees have their remedies. A history of bitterness in relations between

the employer and the union is often the backdrop against which employees seek to bring to an end representation by their bargaining agent. It would scarcely be logical or desirable for the Board to hold that employees desiring to escape from a bitterly adversarial relationship should be denied the opportunity of doing so. In our view, the labour relations background is only of relevance in an exceptional case, where the Board can be satisfied that the employer has publicly engaged in a pattern of illegal behaviour designed to undermine the bargaining agent, and that, as a result, employees' freedom of expression has been thwarted. In the present case, the evidence falls far short of establishing a pattern of notorious illegal anti-union conduct by the employer. We cannot draw from this background information any inferences at all about the voluntariness of the petitions filed in support of these applications. We have therefore concluded that the evidence we heard on the labour relations background is irrelevant to the issue of the voluntariness of the petitions.

8. The next matter we wish to consider is the evidence that was presented concerning the origination, preparation and circulation of the petitions.

9. It is not necessary for us to recount all of the evidence we heard about the origination, preparation and circulation of the petitions. Counsel for the respondents alleged that there was inconsistency in the testimony of various witnesses called on behalf of the applicant and that there was a serious question about the credibility of the applicant's testimony. He also noted that the applicant and her supporters had discussed their evidence among themselves and had been interviewed as a group by their lawyer. This, he suggested, raised a doubt about the veracity of their evidence. We have concluded that there is no basis to these submissions. We have no reason to doubt that the applicant and the witnesses called on her behalf were making a sincere effort to testify truthfully to the best of their recollections.

10. Another attack by counsel for the respondents on the voluntariness of the petitions was based on the reasons put forward by Ms. Taylor and her supporters in favour of decertifying the respondents. In particular, Ms. Taylor told one of the part-time employees that, if the respondents were decertified, an employee who had recently been discharged and whose case was at arbitration would not return to work and, as a result, she (the part-time employee) would be assigned more hours. Ms. Taylor told several employees that, had it not been for the union and the cost to the employer of arbitrations, management would not have put an end to Christmas bonuses. She said that, if there were problems in the post-union era, they would be able to approach the manager or the owner of the store themselves directly. She told them that her role as steward had not been respected by the union and that she had not received mailings from the union. She complained that part-time employees had to pay the same union dues as full-time employees. She blamed the union for having caused a lot of dissension among the employees, as well as between the employer and the employees. Counsel for the respondents criticized several of these elements in the applicant's campaign as being dishonest and being designed to play on employees' fears about job security.

11. In our view, the reasons put forward by Ms. Taylor and her supporters did not go beyond the acceptable bounds of salesmanship, although some of them were contested on factual grounds by the respondents. It is not our role to sit in judgement on the truth or on the merits of what employees might say to each other during a decertification campaign. Our task is to see whether employees signed voluntarily, or whether their endorsement of the application was tainted by undue influences or other impropriety. We are unable to find anything approaching undue influence or impropriety in any of the campaigning in support of the applications.

12. We should add that the applicant filed with the Board, not only the petitions that accompanied the applications, but also petitions that were signed a month after the applications were filed. The reason for the second set of petitions was that the respondents had circulated a

counter-petition (which, in view of the limited degree of overlapping, is not relevant to these applications) and this led the applicant to ask employees to re-affirm their support for the applications. This second set of petitions was filed with the Board prior to the terminal date. The original set of petitions disclosed that (subject to the issue of voluntariness) not less than 45 percent of the employees in each of the bargaining units were in favour of the applications. We heard evidence on the circulation of both sets of petitions, and we also heard some argument as to whether we should inquire into the voluntariness of the second set of petitions, as well as the first. We do not need to go into any examination of this question. We simply record our conclusion that (subject to the question of Ms. Murgich's role in the petitions) we are satisfied that both sets of petitions represent the voluntarily expressed views of those employees who signed them.

13. The final challenge to the voluntariness of the petitions, and the principal one, relates to the role of Sharon Murgich. Ms. Murgich and Ms. Taylor are good friends, a fact that is generally known among employees. According to Ms. Taylor, Ms. Murgich discussed the idea of decertifying the respondents with her before the petitions were launched. Specifically, Ms. Taylor stated that she had asked Ms. Murgich whether she thought that the applications could garner enough support among the employees. Ms. Murgich was an early supporter of the applications. She witnessed several signatures on the petitions. It is alleged by the respondents that Ms. Murgich was, at the least, perceived by employees as acting on behalf of, or with the support of, management. There was an allegation at one stage that Ms. Murgich exercised managerial functions (within the meaning of section 1(3)(b) of the Act), but this was not pursued by counsel for the respondents in his submissions to the Board. In view of the extent of her involvement with the applications, it appeared to be common ground between the parties that, if she was perceived by employees as being linked to management, as alleged by the respondents, the applications would have to be dismissed.

14. Ms. Murgich has been employed by the employer for about 13 years. Until November 1987, she had worked part-time but in that month she was appointed to a newly created full-time position. There was no job posting for the position. Mr. Pachereva, the owner of the store, approached her at work and told her that they needed some help in the office. She was asked if she wanted the job. She accepted it. (Counsel agreed that, under the applicable collective agreements, no job posting was required.)

15. A lot of evidence was presented about Ms. Murgich's new position. The position has no formal title. She has been described by management on occasions as being the "head cashier". Certain employees referred to her as such in their testimony, but stated that she was not known as "head cashier" in the store. Others said she is the "bookkeeper", although they knew that that was not her formal title. Ms. Murgich says she is a cashier who does some office work as well. She estimates that she spends about half of her time in the office and the other half at a check-out counter or on the floor of the store, performing such tasks as stocking shelves and making price changes on merchandise. However, one of the witnesses called on behalf of the respondents, namely Patricia Huellon, estimated that as much as 95% of Ms. Murgich's time was spent on office work. While in the office, Ms. Murgich works mainly on invoices received by the store and on "balancing the cash". With the invoices, she checks prices. They are paid in the employer's head office in Grimsby. As for balancing the cash, her job is to ensure that, for each of the cashiers, the cash in the till balances with the price of merchandise sold at the till and to inform cashiers of problems with their balances. She prepares a list of shortages and overages for each cash, and the list is posted. Another of her office tasks is to distribute employees' statements of wages.

16. Ms. Murgich has no authority to hire or fire employees. She has a limited role in assigning them work: specifically, she schedules their lunch breaks and tells them which cash they are to

work on. She has no responsibility or authority as regards granting employees time off. She does some "banking", but the evidence did not indicate exactly what she did in this area. She knows the combination to the safe, where money and financial documents are kept. She is also aware, on a daily basis, of the total cash receipts in the store. The office in which she works is located in the front of the store. Employees are in and out of the office all day long. The door is open about half of the time, only being closed when she or one of the others in the office is working with money. Another office, located in the basement, is reserved for management. She has been in that office, but does not work there.

17. Ms. Murgich has been treated by the employer as being in the bargaining unit of full-time employees. Union dues are deducted from her pay, benefits are in accordance with the collective agreement, and her name appears on the seniority list. Her rate of pay, however, is higher than that of other cashiers and is not provided for in the collective agreement. The employer says that when it established her new position and a new rate of pay, it anticipated that her rate would be the subject of bargaining at the next round. Unlike the managers at the store, she receives no performance bonus.

18. Extensive evidence was presented on Ms. Murgich's role in employee discipline. Since she assumed her new duties, she has had some involvement, according to the evidence, in the discipline or possible discipline of three employees.

19. The first of these employees was a Ms. Bridget Perri, a cashier accused of theft. The allegations related to some cans of shrimp, some cans of pop and some coupons improperly accepted. Ms. Murgich had some involvement in the investigation of these allegations: specifically, she was requested by the store manager to check the "detail roll" from the cashier's machine, which showed all of the sales that had been registered. At the time, Ms. Perri had not been advised that she was under suspicion. Ms. Murgich participated in some discussion on what the employer should do about its suspicions. Management decided to question Ms. Perri, who was then suspended. Following that suspension, it appears, Ernie Amo, the store manager, asked Ms. Murgich to rewrite for him some notes he had made about the case since his own handwriting was difficult to read. Ms. Murgich complied. In late August 1988, a week or so after being suspended, Ms. Perri was summoned by the employer to a meeting in the basement office. Also present at the meeting were Ms. Huellon, the union steward, Mr. Amo and Ms. Murgich. Ms. Murgich took notes at the meeting. At the conclusion of the meeting, Ms. Perri was informed by Mr. Amo that she was fired. Although she testified that she took notes at the meeting, Ms. Murgich stated that the only reason she was asked to be present was that Ms. Perri had previously made an allegation of sexual harassment against Mr. Amo, and that Mr. Amo therefore wanted to have at the meeting a female witness of his choosing. Ms. Huellon's presence as a union representative was not sufficient for Mr. Amo's purposes. (Ms. Perri, it might be noted, is one of the employees whose reinstatement was recently ordered by an arbitrator.)

20. Ms. Murgich's second experience with employee discipline was in the case of a full-time cashier named Vi Partington. Ms. Murgich had observed her accepting coupons for meat items, which was against company policy. She reported it to management. The next morning, September 30, 1988, a meeting was called on the incident by Mr. Amo. At Mr. Amo's request, Ms. Murgich told Patricia Huellon, the union steward, of the meeting and asked Ms. Huellon to bring Ms. Partington to the meeting. Mr. Amo also asked Ms. Murgich to come to the meeting. The meeting was held in the basement office reserved for management. There was a discussion on company policy concerning the acceptance of coupons, in which Ms. Murgich participated. Mr. Amo, however, rather than Ms. Murgich, told Ms. Partington what she had been observed doing at her cash. Ms.

Partington knew that it had been Ms. Murgich who had seen her accepting the coupons. Mr. Amo issued a verbal warning to Ms. Partington at the meeting.

21. In addition to the disciplining of Ms. Perri and Ms. Partington, there was evidence that Ms. Murgich had been involved in the investigation of a suspected cash shortage by Ms. Huellon, one of the full-time cashiers. Ms. Huellon was believed to have been short by some 1,268 dollars, a much larger amount than most shortages or overages. She was asked to come to a meeting in the store office. In attendance were Ms. Murgich, Mr. Amo and Nancy Nenadovich. Ms. Nenadovich is the daughter of Mr. Pachereva, the owner, and works in the office. There was a short discussion about the suspected shortage in which everyone, including Ms. Murgich, participated. Ms. Huellon testified that she perceived Ms. Murgich to be participating at the meeting as a head cashier. Ms. Huellon was asked if she could account for the shortage, but she was unable to do so. No discipline was imposed. A couple of days later, it was established that the suspected cash shortage was the result of a computer error.

22. The evidence did not establish whether Ms. Murgich's involvement in the cases of Ms. Perri, Ms. Partington and Ms. Huellon was generally known among employees. Ms. Huellon testified that, as union steward, she did not usually discuss with employees discipline affecting fellow employees, although she did discuss the case of Ms. Partington with Ms. Taylor, since she believed that Ms. Taylor had been accepting coupons in the same circumstances that led to Ms. Partington being disciplined. She also testified, however, that it is a fairly small store, with a total of some 40 employees, and that most employees likely learned of management-employee meetings informally by word of mouth.

23. Apart from Ms. Murgich's role in interviewing and disciplining employees, the evidence indicated that Ms. Murgich has a social relationship with Mr. Pachereva, the owner of the store, and his family. Ms. Murgich, according to the evidence, is a close friend of Ms. Nenadovich, the daughter of Mr. Pachereva. Ms. Murgich and Ms. Nenadovich work together in the office. They lunch together fairly often. Ms. Murgich was bridesmaid at Ms. Nenadovich's wedding. Ms. Murgich has been a guest at Mr. Pachereva's home a couple of times. She regards herself as a friend of the Pachereva family and attends family social functions.

24. Ms. Huellon, the union steward, testified that she has regarded Ms. Murgich as being part of management ever since her appointment to the new full-time position. In cross-examination, however, she acknowledged that she had taken no steps to have Ms. Murgich removed from the seniority list and from the dues deduction list, and that she had not objected to her presence at the few union meetings that she (Ms. Murgich) had attended. Mr. Bill Richardson, the respondents' business agent, explained that he did not become aware of Ms. Murgich's duties until late in 1988 and that it would have appeared to be self-serving for the union to seek to have her excluded from the bargaining unit while the termination applications were pending before the Board.

25. We start our examination of the role of Ms. Murgich with the proposition that, in termination applications, the Board is required to satisfy itself that employees who signed petitions in support of the application did so voluntarily. If management has been involved, directly or indirectly, with the application, the Board will find that the application has not been made voluntarily by the employees. The same conclusion will be reached if the Board concludes that employees would likely have perceived that management was involved through the medium of an employee who has supervisory or other "near management" responsibilities. In *Joseph Foley*, [1980] OLRB Rep. Oct. 1347, the Board was faced with a petition that had been actively supported by a working foreman. It articulated the issue it had to resolve in these terms:

10. In assessing the voluntariness of the statement of desire, we are unable to accept the propo-

sition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.

26. We do not attach any particular significance to the evidence of Ms. Murgich's role in the discipline or possible discipline of employees. Her presence at two of the "disciplinary" meetings about which evidence was presented, namely those relating to Ms. Partington and Ms. Huellon, flowed naturally from her responsibilities as the person who was the link between the cashiers and the office. She was the person with responsibility for checking on shortages and overages and a person who was familiar with the store's policy on accepting coupons. While discipline was imposed on Ms. Partington at the meeting relating to her, the meetings appear to have been more in the nature of investigative and counselling meetings, where the employer wanted to try to understand what had happened and correct problems, if any. As for Ms. Murgich's attendance at the meeting concerning Ms. Perri, we have no reason to doubt the explanation given in the evidence on her presence, namely that it was to serve as a witness for Mr. Amo in the event that further allegations of sexual harassment were to be made. Not only was there an absence of evidence to the effect that Ms. Murgich had actually played any part in the decision to discipline these employees, but there was also an absence of any suggestion in anyone's evidence that employees believed that she had played such a part.

27. Apart from her role in these disciplinary meetings, the respondents have argued that her role in the store as a whole would have led employees to regard her as being closely allied to management and to be acting in management's interest. In *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676, a case relied upon by counsel for the respondents, the Board considered whether a petition presented in opposition to an application for certification in respect of some supermarket employees should be rejected on the ground that it had been originated and circulated by the employer's "head cashier", Ms. Miner. This is what the Board said:

18. Ms. Miner's position in the store and responsibilities are somewhat different from that of other employees. They are paid on an hourly basis, while she is paid a salary. She makes up the cashier's weekly schedule, and if they have any customer problems, they are referred to her. Ordinarily, she does not work at the cash registers. Seventy-five per cent of her time is spent in a small office area on the main floor of the store from which she can oversee the cashiers' activities. She delivers cash to and from their work stations, takes care of deposits, Brinks' deliveries, and invoices, and keeps track of the cashiers' time for payroll purposes. If an employee wishes to have time off, she/he advises Ms. Miner, who juggles the schedule accordingly. Ms. Miner testified that she has never had any difficulty accommodating these employee requests, and has been able to do so without reference to higher authority.

19. Ms. Miner also has a role in the imposition of employee discipline. That discipline is meted out in accordance with an established employee policy which, in Ms. Miner's case, relates to cash shortages for which the cashiers are held responsible. Discipline is imposed on a progressive basis, beginning with a warning for the first infraction, a one-day suspension for the second, a three-day suspension for the third, and ultimately a discharge. Employees are allowed a certain number of discrepancies within a defined time period. It is Ms. Miner who scrutinizes the situation in the first instance and determines whether a disciplinary notice is warranted. The action which she initiates is then brought to the store manager's attention and, in the ordinary course, is endorsed by him. In cross-examination (by both the employer and the union), Ms. Miner characterized her role as initiating the disciplinary action. According to Ms. Miner, the store manager has never failed to endorse such "recommendation".

20. The evidence indicates that Ms. Miner may also have a peripheral or participatory role in the hiring and termination of employees. Jeff Lemieux testified that he had contact with Ms. Miner at the time he was hired, turned in his job application to her, and assumed that it was Ms. Miner who checked his references prior to his actual hiring. There is no indication that the plant manager had any role in this process. Similarly, Ms. Miner told the Board about a situation in which one of the cashiers had an unsatisfactory attendance record and was told by Ms. Miner that she would have to "straighten up her act". Ms. Miner and the store manager had previously discussed the situation and how it should be dealt with, and both were present when the employee indicated that she intended to give notice of her termination. Somewhat later, the employee had a change of heart and approached Ms. Miner seeking reinstatement. Ms. Miner, however, was unwilling to accept that revocation and on consultation with the store manager, it was decided that the respondent should not do so.

The Board concluded that the petition should be rejected as a result of Ms. Miner's role in its origination and circulation. It is obvious that Ms. Murgich's duties have much less of a managerial flavour to them than did those of Ms. Miner in *Lo Food*. Ms. Murgich is paid an hourly rate, not a salary. She does not make up cashiers' weekly schedules. She has no role in approving employees' requests for time off. She has no substantive role in imposing discipline. She has no role in hiring.

28. In addition to Ms. Murgich's duties being different, it must also be remembered that, in termination applications, the Board is more inclined to accept petitions at face value than in certification applications (which is what the Board had before it in *Lo Food*). As the Board explained in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a determination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

29. In our view, therefore, the decision in *Lo Food* does not support the respondents' case that Ms. Murgich's involvement in the petitions tainted them. In any event, every case must be approached on its own particular set of facts, and the Board must ask itself whether employees would likely have thought that management was supporting a termination application, or tracking the support it was enjoying among employees, through the employee in question. That determination has to be made on the basis of the evidence presented and inferences that can properly be drawn from that evidence, rather than from a comparison with the facts of other decided cases.

30. As for Ms. Murgich's social relationship with the store owner and his family, we would note that the Board has held in previous cases that such personal relationships might well have a bearing on employees' perceptions of covert management involvement. In *Labatt's Ontario Breweries*, [1985] OLRB Rep. Mar. 433, the Board had this to say on the question of the relevance of personal relationships:

13. A petitioner's personal relationship with a member of management is a factor to be considered in assessing what would have been in the minds of those who signed the petition. The existence of such a relationship, however, does not lead inexorably to the conclusion that the petition does not reflect the voluntary expression of the wishes of those who signed. *International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690 involved an application for termination brought by an employee who was the wife of one of the co-owners of the tavern at which she and the other affected employees were employed. The Board found that

the petition was voluntary. In *Ottawa Commercial Realities Limited*, [1983] OLRB Rep. Nov. 1877, the Board found that a petition in support of a termination application was voluntary, even though the applicant was the sister of the immediate supervisor of the employees affected. A petition circulated by the son of the owner of the employer company was rejected in *Jean Marc Joannis*, [1983] OLRB Rep. Jan. 92, when the Board concluded that the son would be regarded by employees as an arm or agent of his father and, hence, a member of management. It was not without significance in that case that the owner's son, applicant on the application, had served as manager of the store when his father was absent and, it was found, had made references to his father's ownership and management of the business in the course of circulating the petition.

31. Upon a consideration of all of these factors, we have concluded that employees would likely not have seen Ms. Murgich as acting on behalf of management in relation to these applications.

32. We are not persuaded that her role as "head cashier" (if that is what it was) would have led employees to perceive her as being allied with management. She was responsible for few, if any, of the functions usually regarded as *indicia* of management (e.g., hiring, firing, granting time off, scheduling). Her role in disciplining employees was not proved, and there was no evidence that what involvement she did have in this regard was known to employees. We also note that she was known to be treated, by the employer and the union alike, as a member of the bargaining unit. Employees were entitled to assume, and likely did assume, that, if the union had suspected that Ms. Murgich was allied with management, it would not have tolerated her presence at union meetings, and would have taken steps to have her excluded from the bargaining unit. This is particularly true, in our view, if labour relations were as polarized and as turbulent as the respondents have alleged.

33. Ms. Murgich's social relationship with the owner of the store and his family has given us some cause for concern. However, in the circumstances of the case, we have no reason to conclude that this relationship would have been regarded as unusual by employees. We note that two other employees testified about social relationships with the owner and his family: one said that he played sports with one of the owner's sons, the other that his parents were neighbours of the owner and that he knew the family. In this type of environment, we are not persuaded that Ms. Murgich's social relationship with the owner and his family would likely have been viewed by employees as suggesting that she was pursuing the owner's interests in supporting the applications.

34. We have therefore concluded that we should accept the petitions supporting these applications as having been signed voluntarily.

35. We now turn to the question of Ms. Taylor's competence to bring termination applications in respect of the two bargaining units of which she was not a member.

36. As noted earlier, the three bargaining units at the intervener's store are composed, respectively, of full-time employees (other than those in the Meat Department), part-time employees, and full-time Meat Department employees. Local 633 represents the Meat Department bargaining unit, Local 175 the other two units. Ms. Taylor is in the part-time unit. Counsel for the respondents took the position that an employee can only make an application under section 57 of the Act if he is in the bargaining unit in question or, exceptionally, if he is expressly authorized to make the application by employees in another unit. Counsel referred the Board to the decision in *Huntsville I.G.A.*, [1988] OLRB Rep. Jan. 1517. He noted that the petitions in the present case, unlike those in *Huntsville I.G.A.*, contained on their face no authorization for Ms. Taylor to make these applications, and that no evidence had been presented to demonstrate that the employees

from the unit of full-time employees and the unit of Meat Department employees had, even informally, authorized Ms. Taylor to make these applications on their behalf.

37. We have considered the decision in *Huntsville I.G.A.*, as well as the case-law referred to therein. Although in *Huntsville I.G.A.* the petitions did expressly authorize the applicant to make the applications, a fact noted by the Board in its decision, we do not read the cases as supporting the proposition that, absent an express authorization in the petitions, an application can only be made by an employee in respect of his own bargaining unit. In paragraphs 10 and 11 of the *Huntsville I.G.A.* case, the Board expressed the following views on the approach that should be taken to this issue:

10. In our opinion we should not take an unduly "technical" view of applications such as these, and we are supported in that approach by cases such as *Gardiner's Supermarket Limited*, [1985] OLRB Rep. Dec. 1737; *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. Oct 1023; *Thomas Construction (Galt) Limited*, [1982] OLRB Rep Nov. 1727 and *Cara Operations Limited (Retail Stores Division)*, [1984] OLRB Rep. Oct. 1378. Indeed, the situation in *Cara Operations Limited* is very similar to the present one because, there, the *nominal* applicants were members of a full-time bargaining unit, but the termination application and the related anti-union petition encompassed employees in the part-time bargaining unit as well. The Board found that the *nominal* applicants were making application both on their own behalf, and on behalf of the employees in the other bargaining unit. That approach was approved and followed by the Board in *Economy Fair*, [1985] OLRB Rep. Sept. 1357.

11. We are inclined to take the same view. In the instant case it is evident from the documentary and other evidence before us that the majority of the employees in each bargaining unit wish to terminate the respondent(s) bargaining rights, and have designated Mr. DeHaan to take such steps as are necessary to accomplish that objective. Indeed, had Mr. DeHaan framed his application as being on his own behalf and on behalf of the signatories to the supporting petition there would be no issue. But when the application and the petition document are read together, that is obviously the employees' intention, and we find nothing fatal in the omission of those words from the application's style of cause. While the nominal applicant (Mr. DeHaan) is a member of the meat department bargaining unit, we find that this application is, in fact, being made by a majority of employees of each of the three bargaining units, and that the documentary and other evidence before us warrants the taking of a representation vote to test the union's continued support.

38. We are satisfied, from the evidence as a whole, that, upon signing the petitions, the employees understood full well that, as a result of their petitions, one or more applications would be made to the Board for the termination of the respondents' bargaining rights. We are also satisfied that they either knew that Ms. Taylor would be the nominal applicant or were indifferent as to who the nominal applicant would be. On the basis of *Huntsville I.G.A.* and the cases discussed therein, we conclude that Ms. Taylor was competent to bring all three applications.

39. In the result, we are satisfied that not less than 45 percent of the employees of Thorold I.G.A. Market in each of the three bargaining units represented by the respondents at the time the applications were made had voluntarily signified in writing that they no longer wish to be represented by the respondent trade unions as of December 15, 1988, the terminal date fixed for these applications and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade unions under section 57(3) of the said Act.

40. We direct that a representation vote be taken among the employees in each of the bargaining units represented by the respondents, as described in their most recent agreements with the intervener, namely:

- (1) All employees of Thorold I.G.A. Market, in Thorold, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department managers.
- (2) All employees of the Company at Thorold Ontario, save and except Meat Department employees, Department Managers, persons above the rank of Department Manager, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.
- (3) All meat department employees of the Company at Thorold, Ontario, save and except meat department manager, deli manager, persons above the rank of Department Manager, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

41. The Meat Department employees will be asked to indicate whether they wish to continue to be represented by Local 633 of the United Food and Commercial Workers International Union in their employment relationship with the employer. The employees in the other two bargaining units will be asked to indicate whether they wish to continue to be represented by Local 175 of the United Food and Commercial Workers International Union in their employment relationship with the employer.

42. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER PAT V. GRASSO; August 24, 1989

1. I cannot agree with the decision of the majority of the Panel in this matter.
2. The Union presented 3 major challenges to the application:
 - a) that there was a very turbulent labour relations environment at the place of work and that we should, as a result, be sceptical about the voluntariness of the petitions;
 - b) that the quality of the evidence concerning the origination, preparation and circulation of the petitions was deficient, and that we could not rely on that evidence; and
 - c) that Sharon Murgich, a supporter of the applications, who played an important role in the circulation of the petitions, was perceived by employees as acting on behalf of, or with the support of, management.
3. My decision is based on the role of Sharon Murgich in support of this application.
4. Ms Murgich has been employed by the company for some 13 years as a part-time employee. In November 1987, Mr. Pachereva the owner of the store told her that they needed help in the office and was asked if she wanted the job. She accepted it.

5. Ms Murgich testified that she spends about 50% of her time in the office and 50% of her time as a cashier or on the floor stocking shelves and changing prices on merchandise. Ms Huellon a witness for the Union estimated that Ms Murgich spends about 95% of her time in the office. Mr. Wayne Hilderbrindt a witness for the applicant testified that he often takes receipt sheets to the office. Ms Murgich is usually there but he does not know what she does with the receipts.

6. The new position held by Ms Murgich has been at times described by both, employer and employees, as a "head cashier", while other employees have described her as a "bookkeeper". It appears from the evidence that while working in the office, Ms Murgich works on invoices, checks prices and balances cash, she also does some banking. She knows the combination to the safe, where money and financial statements are kept. She is also aware, on a daily basis, of the total cash receipt in the store. She has a role in assigning work to other cashiers, schedules their lunch breaks and tells them which cash register they are to work on. All of this work was performed by the Store Manager before it was assigned to Ms Murgich.

7. The office in which Ms Murgich works is located at the front of the Store. The Store Manager Mr. Ernie Amo also works in that office, as does Nancy Nenadovich. Mr. Pachereva the owner of the store is the father of Ms Nenadovich.

8. According to the evidence Ms Murgich has a friendly and social relationship with Mr. Pachereva, the owner of the store. She is also a close friend of Ms Nenadovich. Ms Murgich was a bridesmaid at Ms Nenadovich's wedding, has been a guest at Mr. Pachereva's home and she regards herself as a friend of the Pachereva family and attends family social functions.

9. Since Ms Murgich assumed her new duties she has been involved in the discipline of three employees.

10. One of the employees, Bridget Perri, a cashier was accused of theft. The allegations involved some shrimps, some cans of pop and some coupons improperly accepted. Ms Murgich was involved in the investigation of these allegations. She was requested by the Store Manager to check the "detail roll" from the cashier's cash register. While the investigation was going on, Perri had no idea that she was under suspicion. Ms Murgich participated with management on what action should be taken about its suspicions.

It was decided to question Ms Perri, who was subsequently suspended. After the suspension, Ernie Amo the Store Manager asked Ms Murgich to rewrite the notes he had made about the case since his own handwriting was difficult to read. Mr. Amo's notes were not submitted as evidence.

11. About a week after being suspended, Ms Perri was called by the employer to attend a meeting. The meeting was held in the basement office. Present at the meeting were Ms Perri, Ms Huellon the Union Stewart, Mr. Amo the Store Manager, and Ms Murgich. At the meeting Ms Murgich sat on the side of management and took notes for Mr. Amo. At the conclusion of the meeting, Ms Perri was fired. Ms Murgich testified that the only reason she was asked to be present at the meeting was that Ms Perri had previously accused Mr. Amo of sexual harassment and that Mr. Amo therefore wanted to have a female witness, notwithstanding that Ms Huellon was present at the meeting. The company did not call any evidence on the matter. It should be noted at this time that Ms Perri was recently reinstated by an arbitrator.

12. The next incident occurred in the case of a full-time cashier named Vi Partington. Ms Murgich had seen her accepting coupons for meat items, which was against company policy. Ms Murgich reported the matter to management. On September 30, 1988, a meeting was called by the Store Manager. At the request of the Manager Mr. Amo, Ms Murgich told Ms Huellon of the

meeting and to bring Ms Partington to the basement office. At the request of Mr. Amo, Ms Murgich also attended the meeting. Ms Murgich participated in the discussion on behalf of management, about company policy concerning the acceptance of coupons. At the end of the meeting Ms Partington received a verbal warning. Again the company offered no evidence.

13. In addition to the above, Ms Murgich had been involved in the investigation of a suspected cash shortage by Ms Huellon, a full-time cashier and a Union Stewart. It was believed that the shortage was about \$1,268. Ms Huellon was asked to attend a meeting at the office where Ms Murgich works. In attendance were Ms Murgich, Mr. Amo the Store Manager, and Ms Nenadovich the daughter of the owner. Everyone was involved in the discussion of the shortage, including Ms Murgich. Ms Huellon was asked if she could account for the shortage. She was unable to do so. Some time later, it was concluded that the shortage was the result of a computer error. Ms Huellon testified that she regards Ms Murgich as being part of Management and that Ms Murgich gives direction to all cashiers.

14. Sandra Taylor, the applicant and chief witness, testified that it was her idea to start a petition against the Union. The first person she talked to about the petition was Sharon Murgich. Ms Taylor could not recall whether she spoke to Ms Murgich before or after she sought legal help.

15. There is evidence that Ms Murgich played a major role in the petition. She signed it, circulated it, witnessed some of the signatures and talked to other employees about signing the petition.

16. Mr. Wayne Hildebrindt testified that Ms Murgich was always present at the meetings that he attended, including meetings with the Lawyer.

17. I don't feel that we should accept a petition even if it may be free of actual company interference if it was circulated in circumstances that the employees who signed it would reasonably believe that the circulator was part of management or had greater proximity to managerial authority than other employees or where the employees would reasonably be concerned that the petition had the support of management or that management would become aware of whether the employee decided to sign the petition or not.

18. The Board has always been sensitive to the particular vulnerability of employees arising out of the employer-employee relationship. As stated in the *Pigott Motors (1961) Ltd.*, case 62 CLLC 16.264:

So vulnerable are employees to employer influence that the influence need not even be created by employer design. The Board in a long line of cases has refused to accept as voluntary a statement of opposition to a trade union signed in circumstances where the employees could reasonably believe that their failure to sign would come to the attention of management. In the *Morgan Adhesives of Canada Limited* case, [1975] OLRB Rep. Nov. 813, for example, the Board stated at paragraphs 30 and 31:

30. The findings of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board which would support such a finding.

31. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management.

19. As I have noted, Ms Murgich's involvement at the beginning of the petition was such

that employees would perceive management as having a vested interest in the petition, or at least, employees would reasonably have believed that their involvement in the petition would have been brought to the attention of management.

20. I am satisfied that in these circumstances employees could reasonably perceive Ms Murgich to be an arm of management. Her knowledge of daily operations of the company, her relationship to the owner and his family, her close working proximity to management, her involvement in attending disciplinary meetings, taking part in the discussion as a member of management, taking notes for and on behalf of management and the fact that this is a small supermarket, virtually all employees would be aware of Ms Murgich activities and she could reasonably be regarded as an agent of management and not merely a fellow employee expressing an honestly held independent belief.

21. For all of the above reasons, I find the petition not to be voluntary and I therefore dismiss the application.

0237-89-M Dana M. Colarusso, Applicant v. Canadian Union of Educational Workers, Local 2, Respondent Trade Union v. Department of English University of Toronto, Respondent Employer

Religious Exemption - Timeliness - Religious exemption application untimely - Applicant arguing that the timeliness restriction conflicted with the *Ontario Human Rights Code* - Code not prevailing over *Labour Relations Act* - Application dismissed

BEFORE: *Michael Bendel*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *Dana Mafalda Colarusso* for the applicant; *Richard A. Blair*, *Vanessa Kelly* and *Brian Robinson* for the respondent trade union; *W. S. Cook* and *J. H. Parker* for the respondent employer.

DECISION OF THE BOARD; August 16, 1989

1. This is an application for exemption from union security provisions on the grounds of religious conviction or belief pursuant to section 47 of the *Labour Relations Act*.

2. At the conclusion of the hearing of this matter, the Board gave oral reasons for dismissing the application. The applicant has now asked that reasons be given in writing.

3. Section 47 of the Act reads as follows:

47.-(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

4. The bargaining agent was certified for this bargaining unit in the mid-1970's. In March 1989, the current collective agreement was signed. It provides for mandatory dues check-off, as have the three or four previous collective agreements going back to 1980. The applicant has been an employee in the bargaining unit since January 1989. The ground relied upon by the applicant in seeking exemption from union dues is that the union "has a pro-choice policy and I am a Roman Catholic with an anti-abortion conscience."

5. Counsel for the respondent trade union opposed the application on the ground that it was untimely. Relying on a long line of cases interpreting and explaining subsection 47(2), counsel argued that an application can only be brought by an employee who is employed at the time the first collective agreement requiring the deduction of union dues is entered into.

6. The applicant did not dispute this interpretation of subsection 47(2) as such. She argued, however, that the restrictions on the exemption from the mandatory payment of dues contained in subsection 47(2) conflicted with the *Ontario Human Rights Code*, S.O. 1981, c. 53. She claimed that she could not continue to work as a teaching assistant if she was required to pay dues to this union since she could not reconcile support for a pro-choice stand on abortion with her own religious beliefs. It was unfair to her to have to make a choice between her work and her religious beliefs. The Code protected her, she claimed, from this "constructive discrimination", as she called it. She argued that the provisions of the Code had precedence over subsection 47(2).

7. The applicant also drew our attention to section 13 of the Act, which reads as follows:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code, 1981* or the *Canadian Charter of Rights and Freedoms*.

8. It was not seriously argued by the applicant that her application was "timely" under subsection 47(2) and it is therefore not necessary for us to elaborate on our conclusion that subsection 47(2) is a bar to the application. As for the applicant's reliance on the Human Rights Code, we note that this very issue was considered by the Board in *Umex Corp. Ltd.*, [1981] OLRB Rep. Nov. 1691, a case cited by counsel for the trade union. The Board there reached the following conclusion on the relationship between section 47 of the Act and the Human Rights Code:

16. If the applicant's contention is that section 47(2) of the *Labour Relations Act* is either void or unenforceable because it is in conflict with *The Ontario Human Rights Code*, we see no basis for this contention. The provisions of the Code relied upon prohibit discrimination against a person because of, *inter alia*, his "creed". We fail to see how section 47(2) conflicts with this

prohibition. In any event, even if this was the case, the applicant's contention still must fail since the Code does not have primacy over the *Labour Relations Act*, and cannot affect its interpretation or enforcement.

No reasons were advanced by the applicant to persuade us that the decision in *Umex Corp. Ltd.* should not be followed. We agree with the conclusion in that case. In our view, the Human Rights Code does not purport to prevail over the provisions of other legislation and it does not have the effect of prevailing over the *Labour Relations Act*.

9. As for section 13 of the Act, also relied on by the applicant, it would appear to us to have no relevance to the question of the applicant's request that she be exempted from union dues. And since the application before the Board is one for exemption from union dues, not a request that we reconsider the trade union's certification, no useful purpose would be served by going into the question of whether the union's pro-choice position on abortion constitutes discrimination within the meaning of section 13. We should add that we cannot entertain any arguments, on this application, about the impact of this alleged discrimination on the union's bargaining rights.

10. It was for these reasons that the Board dismissed the application.

COURT PROCEEDINGS

0068-88-R; 0767-88-R; 1149-88-R; 1484-88-R; 1552-88-R; 2261-88-R; 2666-88-R (Court File No. 823/89) **Pinkerton's of Canada Ltd.**, Applicant v. Ontario Labour Relations Board, Richard Bibeault, Canadian Guards Association, National Protective Services Company Limited, The Board of Management for the Metropolitan Toronto Zoo, Burns International Security Services Limited, Gordon A. Southorn, Wackenhut of Canada Limited, Shane Freeman, United Steelworkers of America, Larry Bishop, Inco Limited, International Union United Plant Guard Workers of America, Respondents

Adjournment - Certification - Charter of Rights and Freedoms - Judicial Review - Stay - Issue in certification cases involving the effect of the Charter on the security guard provision in the Act - Whether Charter issue should be postponed pending the release of the final decision in *Cuddy Chicks* concerning the Board's jurisdiction to deal with Charter issues - Adjournment denied - Labour relations considerations favouring expedition - Employer bringing application for judicial review on the grounds that, *inter alia*, the Board exceeded its jurisdiction in attempting to hear a Charter challenge and failed to observe the principles of natural justice by forcing the parties to submit to a procedure that would not afford them an opportunity to know the case they had to meet - Judicial review dismissed by Divisional Court

Board decision found at [1989] OLRB Rep. July 783.

High Court of Justice, Divisional Court, Steele, Holland and Rosenberg JJ., August 23, 1989:

Rosenberg (orally): In our view there are only two issues that we need address at this time. Firstly,

should the board have adjourned the hearing until *Re Cuddy Chicks Ltd. and O.L.R.B. et al*, was finally decided and secondly, was there a denial of natural justice in refusing to stay the proceedings pending full disclosure and time to prepare.

With regard to the first, the applicants have not satisfied us that the board made a reviewable error in refusing to adjourn the hearing pending a final disposition of the *Re Cuddy Chicks, supra*, appeal.

Similarly, although it appears to us that an adjournment will be appropriate when the nature of the evidence to be led by the unions is known and the hearing is about to commence, the board will be in the best position to determine that and the details with regard to the time necessary to prepare and the adequacy of disclosure at the outset of the hearing. Therefore, the present application is premature. On that ground only, the application for a stay is dismissed. However, we are of the view that it is essential that the responding parties before the board know the case they have to meet and have adequate time to prepare.

Accordingly, the application is dismissed without restricting in any way the right of any of the participants to bring such application as may be deemed advisable if and when the board's disposition of a further application to adjourn is made.

There will be no costs.

[*Pinkerton's of Canada Ltd. is seeking leave to appeal to the Court of Appeal the Divisional Court's decision: Editor*]

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1615-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. 763998 Ontario Inc. c.o.b. as Mann's Ema Foods (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

Unit #2: "all employees of the respondent at 1298 Trafalgar Street, London regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Store Manager and Assistant Store Manager" (42 employees in unit)

1750-88-R: Southern Ontario Newspaper Guild, Local 87 (Applicant) v. Polish Alliance Press Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except general manager and editor-in-chief, those above the rank of general manager and editor-in-chief, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit)

0027-89-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Levert & Associates Contracting Inc. Brican Construction Ltd. (Respondent)

Unit: "all journeymen electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen electricians and electricians' apprentices in the employ of the respondent in all other sectors within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0191-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Flo-Con Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its N.I. Wheel division in Cambridge, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, and students employed during the school vacation period" (68 employees in unit) (*Having regard to the agreement of the parties*)

0350-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. 737049 Ontario Ltd. c.o.b. D'Luxe Drywall (1987) (Respondent) v. Group of Employees (Objectors)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Clarity Note*)

0378-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Crushall Aggregates Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto and the Town of Markham, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

0455-89-R: Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL:CIO:CLC (Applicant) v. Golden Gate Lodging Home Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (63 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in Windsor, save and except supervisors, and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

0471-89-R: Canadian Paperworkers Union (Applicant) v. Code Felt Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Perth, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period" (21 employees in unit)

0484-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Inter-City Gas Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Propane Division in the Thunder Bay trade area, save and except supervisors, persons above the rank of supervisor, and office, clerical and sales staff" (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0603-89-R, 0604-89-R: United Steelworkers of America (Applicant) v. Wilberforce Planing Mill Ltd. and Wilberforce Wood Components Ltd. (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Monmouth Township, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

0622-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corp. #212 (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance working at Tiffany Place, 11 Wincott Drive in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, office and sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

0653-89-R: Graphic Communications International Union, Local N-1 (Applicant) v. The Print Shop (Respondent)

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons regularly employed for not more than 24 hours per week" (4 employees in unit) (*Having regard to the agreement of the parties*)

0661-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Fergerson Hill Development Corporation (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of

Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0663-89-R: Canadian Union of Public Employees (Applicant) v. The Kent County Roman Catholic Separate School Board (Respondent)

Unit: “all employees of the respondent in the County of Kent employed in its Social Services Department, save and except superintendent and those above the rank of superintendent, office and clerical employees, and persons for whom any trade union held bargaining rights as of June 8, 1989” (7 employees in unit) (*Having regard to the agreement of the parties*)

0665-89-R: Canadian Union of Public Employees (Applicant) v. St. Vincent de Paul Hospital (Respondent)

Unit: “all lay office and clerical employees of the respondent in Brockville, Ontario, save and except C.E.O. secretary and aide, D.O.N. executive assistant, payroll officer, palliative care service volunteer coordinator, supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of June 8, 1989” (36 employees in unit) (*Having regard to the agreement of the parties*)

0666-89-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. Cold Springs Food Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in its pork plant at Thamesford, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, maintenance staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (25 employees in unit) (*Having regard to the agreement of the parties*)

0697-89-R: London & District Service Workers’ Union, Local 220, SEIU, AFL, CIO, CLC (Applicant) v. Oxford Regional Nursing Home (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Ingersoll, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, activation co-ordinator, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (27 employees in unit) (*Having regard to the agreement of the parties*)

0724-89-R: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Applicant) v. 838637 Ontario Ltd. (Respondent)

Unit: “all employees of the respondent at Windsor, save and except forepersons, those above the rank of forepersons, office and sales staff, those persons working less than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

0729-89-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Huronia District Hospital (Respondent)

Unit #1: “all paramedical employees of the respondent in Midland, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons in any bargaining unit for which any trade union held bargaining rights as of June 16, 1989” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all paramedical employees of the respondent in Midland regularly employed for not more than 24 hours per week and students employed during the school vacation period as paramedical employees, save and except supervisors, persons above the rank of supervisor, and persons in any bargaining unit for which any trade union held bargaining rights as of June 16, 1989” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0732-89-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. The Fairway Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its editorial department in the Regional Municipality of Waterloo and the County of Wellington, save and except news editor - Guelph Tribune, news editor - Waterloo Chronicle, news editor - Cambridge Times, general manager - Highlights/Visitor Magazine, general manager - Exchange Magazine, general manager/editor New Hamburg - Independent/New Era Magazine, publisher - Cambridge Times/Guelph Tribune, general manager - Waterloo Chronicle/Kitchener Market Place, publisher, persons exercising managerial functions or employed in a confidential capacity relating to labour relations within the meaning of section 1(3)(b) of the *Labour Relations Act*, persons regularly employed for not more than twenty-four hours per week and interns while enrolled in a journalism course at a post secondary institution" (23 employees in unit) (*Having regard to the agreement of the parties*)

0733-89-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. The Fairway Group Inc. (Respondent)

Unit: "all employees of the respondent in its production department in the City of Kitchener, save and except typesetting foreperson, pressroom foreperson, persons above the rank of typesetting and pressroom forepersons, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (51 employees in unit) (*Having regard to the agreement of the parties*)

0735-89-R: International Brotherhood of Electrical Workers, Local 530 (Applicant) v. Herter-Neill Construction Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0738-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Ault Foods Ltd. (Respondent)

Unit: "all office and clerical employees of the respondent at its Northside Dairy Division in the City of Welland, save and except managers, persons above the rank of manager, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

0739-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Ault Foods Ltd. (Respondent)

Unit: "all employees of the respondent at its Northside Dairy Division in the City of Welland, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

0758-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 799316 Ontario Inc. c.o.b. as Concrete Systems (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0772-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Sanremo Contractors Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Dur-

ham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0780-89-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Lakehead Board of Education (Respondent)

Unit: “all continuing education instructors employed by the respondent in the Lakehead School District within the District of Thunder Bay, save and except those instructors instructing in Heritage Language and General Interest Courses and save and except the Principal of Adult and Continuing Education, those above the rank of Principal of Adult and Continuing Education, and employees in bargaining units for which any trade union held bargaining rights as of June 21, 1989” (28 employees in unit) (*Having regard to the agreement of the parties*)

0790-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. John Deere Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Welland, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, sales staff, security guards, students employed during the co-operative training program with a university or community college and students employed during the school vacation period” (612 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0800-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. R and W Timber Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0836-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Fos-Tur Pipelines Inc. (Respondent)

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0877-89-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Canadian Construction Controls Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit)

0955-89-R: Labourers’ International Union of North America, Local 527 (Applicant) v. CPM Paving Company Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the

United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2842-88-R: Ontario Public School Teachers' Federation (Applicant) v. The Muskoka Board of Education (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

Unit: "all occasional teachers and supply instructors employed by the Muskoka Board of Education in its elementary panel in the District of Muskoka, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (75 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	75
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	2

2875-88-R: Ontario Public School Teachers' Federation (Applicant) v. The Peel Board of Education (Respondent)

Unit: "all occasional teachers and supply instructors employed by the respondent in its elementary panel in the Region of Peel, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (482 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	480
Number of persons who cast ballots	93
Number of ballots marked in favour of applicant	85
Number of ballots marked against applicant	8
Ballots segregated and not counted	1

0504-89-R: Independent Canadian Transit Union (Applicant) v. Carleton University (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener)

Unit: "all stationary engineers and persons employed primarily as their helpers in the central heating plant of the respondent at Ottawa, save and except chief operating engineer" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

0542-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hoover Universal (Johnson Controls) Inc. (Respondent) v. Comco Employees Association (Intervener #1) v. Mary Gallant (Intervener #2)

Unit: "all employees of the company, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period or on part-time" (185 employees in unit)

Number of names of persons on list as originally prepared by employer	191
Number of persons who cast ballots	170
Number of ballots marked in favour of applicant	88
Number of ballots marked in favour of intervener	82

0543-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. A.G. Simpson Co. Ltd. (Respondent) v. Simpson Plant Council (Intervener)

Unit: “all employees of the respondent, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period or on part-time” (1667 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	1670
Number of persons who cast ballots	1510
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	1506
Number of segregated ballots cast by persons whose names appear on voters' list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	12
Number of ballots marked in favour of applicant	865
Number of ballots marked in favour of intervener	629
Ballots segregated and not counted	4

Applications for Certification Dismissed Without Vote

2801-88-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 548514 Ontario Inc. c.o.b. C. C. Enterprises, 548980 Ontario Inc. c.o.b. Quinte Milk & Cream, Cumniam Dairy Inc. (Respondents) (6 employees in unit)

0361-89-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Her Majesty the Queen in Right of Canada as Represented by Treasury Board (Respondent) (132 employees in unit)

0648-89-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Windsor Arms Hotel Ltd. (Respondent) v. Canadian Textile & Chemical Union (Intervener) (71 employees in unit)

0770-89-R: Canadian Union of Public Employees (Applicant) v. Helen Henderson Care Centre (Respondent) (56 employees in unit)

0771-89-R: Canadian Union of Public Employees (Applicant) v. Laidlaw Transit Ltd. (Paris Division) (Respondent) v. Group of Employees (Objectors) (120 employees in unit)

0818-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Renzo Consolo Plumbing & Heating Ltd. (Respondent) (2 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2669-88-R: Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 880 (Applicant) v. The Butcher Engineering Enterprises Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Village of St. Clair Beach, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (55 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	38

0639-89-R: International Ladies Garment Workers Union (Applicant) v. Direct Home Upholstery Ltd. and D.H.U. Designs Inc. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, and sales staff, persons regularly employed for not more than 24 hours per week” (96 employees in unit)

Number of names of persons on revised voters' list	82
Number of persons who cast ballots	75
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	47

Application for Certification Dismissed Subsequent to a Post-Hearing Vote

1615-88-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. 763998 Ontario Inc. c.o.b. as Mann's Ema Foods (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent at 1298 Trafalgar Street, London, save and except store manager, assistant store manager, customer service manager/head cashier, those above the rank of customer service manager/head cashier, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	40
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	32

Unit #2: (see *Bargaining Agents Certified Without Vote*)

2112-88-R: United Steelworkers of America (Applicant) v. Elgin Parkes Wholesale Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Ingersoll and the City of St. Thomas, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and students employed during the school vacation period" (17 employees in unit) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	8

0016-89-R: Service Employees' International Union, Local 204 affiliated with the S.E.I.U., AFL:CIO:CLC: (Applicant) v. Mr. Grumpp's Restaurant & Emporium (Yonge & Eglinton) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent at 2200 Yonge Street, Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (29 employees in unit)

Number of names of persons on list as originally prepared by employer	69
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	10

Unit #2: "all employees of the respondent at 2200 Yonge Street, Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (30 employees in unit)

Number of names of persons on list as originally prepared by employer	69
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	11

0128-89-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. CAA Toronto Club (Respondent)

Unit: "all dependent contractors of the respondent in the Regional Municipality of Metropolitan Toronto,

save and except persons regularly employed for not more than 24 hours per week” (68 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	65
Number of persons who cast ballots	62
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	36

0301-89-R: United Steelworkers of America (Applicant) v. Minnova Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its Winston Lake Division in the District of Thunder Bay, save and except forepersons, those above the rank of foreperson, office, technical, clerical and sales staff, students employed during the school vacation period and students employed on a co-operative work study program” (96 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	96
Number of persons who cast ballots	87
Number of segregated ballots cast by persons whose names appear on voters’ list	2
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	47
Ballots segregated and not counted	2

Applications for Certification Withdrawn

1892-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Krause Enterprises (Eastern) Ltd. (Respondent) v. Group of Employees (Objectors)

1840-88-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Apex Construction General Contractors (Respondent)

2953-88-R: Teamsters Local No. 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. S. D. Morden Transport (Respondent)

0044-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Spandril Development Inc. (Respondent)

0293-89-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent)

0602-89-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Redg Construction Ltd. (Respondent)

0718-89-R: Local 164 Draftsmen’s Association of Ontario International Federation of Professional & Technical Engineers, AFL:CIO:CLC (Applicant) v. Transelectrix Technologies Inc. (Respondent)

0736-89-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. 799316 Ontario Inc. c.o.b. as Concrete Systems (Respondent)

0737-89-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Northern Communications Services Ltd. (Respondent) v. Group of Employees (Objectors)

0874-89-R: Christian Labour Association of Canada (Applicant) v. Babcock Nursing & Rest Home Ltd. (Respondent)

0886-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Carch Design Ltd. (Respondent)

0932-89-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Woodstock (Respondent)

0975-89-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Gibraltar Concrete Ltd. (Respondent)

1089-89-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. M.S. Electric Co. Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0819-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1855 Jane Ltd., Perfect Metro Cleaners, 751621 Ontario Ltd. (Respondents) (*Withdrawn*)

1257-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bonshaw Estates Inc. (740633 Ont. Ltd.), 10 Tuxedo Court Inc., 30 Tuxedo Court Inc., Delcorp Ltd., Perfect Metro Cleaners (Respondents) (*Withdrawn*)

1258-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. 769134 Ontario Inc., West Hill Redevelopment Company Ltd., Perfect Metro Cleaners (Respondents) (*Withdrawn*)

1778-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Hemco Developments Ltd., Aldoren Developments Ltd., H&J Barkin Investments Ltd. c.o.b. as L.D.T. Investments, Leith Hill Apartments Ltd., and Town Garden Homes Ltd. (Respondents) (*Withdrawn*)

2857-88-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Gottcon Contractors Ltd., Gottardo Properties (Dome) Inc., Gottardo Properties Ltd., Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Ltd., Gottardo Holdings Company Ltd., Gottardo Management Ltd., and Gottardo Corporation (Respondents) v. Labourers' International Union of North America, Local 506 (Intervener) (*Dismissed*)

2983-88-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 548514 Ontario Inc. c.o.b. C.C. Enterprises, 548980 Ontario Inc., c.o.b. Quinte Milk & Cream, Cunniam Dairy Inc. (Respondents) (*Granted*)

0261-89-R, 0262-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. A.B.B.L.O. Construction Inc. and J.R. Noel Plastering Ltd. (Respondents) (*Withdrawn*)

0445-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2965 Resilient Floorworkers (Applicant) v. 757900 Ontario Inc. c.o.b. U-Flooring Contracting & 666366 Ontario Inc. c.o.b. Leading Edge Contract Interiors (Respondents) (*Withdrawn*)

0461-89-R, 0462-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Thomas Fuller Construction Co. (1958) Ltd. and Metcalfe Realty Company Ltd. (Respondents) (*Granted*)

0474-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Apex Construction, a division of Vaultex Contractors Ltd. and Gold Stamp Cabinetmakers Inc. (Respondents) (*Withdrawn*)

0576-89-R: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Ivan Forster, c.o.b. as Unique Installations and 447244 Ontario Ltd. c.o.b. as AMCOL and/or as The Atrium Manufacturing Company of London (Respondents) (*Granted*)

SALE OF A BUSINESS

0819-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1855 Jane Ltd., Perfect Metro Cleaners, 751621 Ontario Ltd. (Respondents) (*Withdrawn*)

1257-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bonshaw Estates Inc. (740633 Ont. Ltd.), 10 Tuxedo Court Inc., 30 Tuxedo Court Inc., Delcorp Ltd., Perfect Metro Cleaners (Respondents) (*Withdrawn*)

1258-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. 769134 Ontario Inc., West Hill Redevelopment Company Ltd., Perfect Metro Cleaners (Respondents) (*Withdrawn*)

1779-88-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Hemco Developments Ltd., Aldoren Developments Ltd., H&J Barkin Investments Ltd. c.o.b. as L.D.T. Investments, Leith Hill Apartments Ltd., and Town Garden Homes Ltd. (Respondents) (*Withdrawn*)

2857-88-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Gottcon Contractors Ltd., Gottardo Properties (Dome) Inc., Gottardo Properties Ltd., Gottardo Contracting (1980) Inc., Gottardo Contracting Co. Ltd., Gottardo Holdings Company Ltd., Gottardo Management Ltd., and Gottardo Corporation (Respondents) v. Labourers' International Union of North America, Local 506 (Intervener) (*Dismissed*)

0261-89-R, 0262-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. A.B.B.L.O. Construction Inc. and J.R. Noel Plastering Ltd. (Respondents) (*Withdrawn*)

0446-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2965 Resilient Floorworkers (Applicant) v. 666366 Ontario Inc. c.o.b. Leading Edge Contract Interiors (Respondent) (*Withdrawn*)

0461-89-R, 0462-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Thomas Fuller Construction Co. (1958) Ltd. and Metcalfe Realty Company Ltd. (Respondents) (*Granted*)

0578-89-R: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Ivan Forster, c.o.b. as Unique Installations and 447244 Ontario Ltd. c.o.b. as AMCOL and/or as The Atrium Manufacturing Company of London (Respondents) (*Granted*)

CROWN TRANSFER ACT

0956-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and Barry Lightfoot (Respondent) (*Granted*)

1070-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and Otonabee Region Conservation Authority (Respondents) (*Granted*)

1383-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and Nairn Centre Construction Co. Ltd. (Respondents) (*Withdrawn*)

1617-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and John Knight and Lorraine Norris c.o.b. as Agassiz Forestry/Environmental Services (Respondents) (*Granted*)

1884-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and John McCormack (Respondents) (*Granted*)

1885-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Natural Resources, and Elsie McCormack (Respondents) (*Granted*)

2324-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Government Services, and Wayne Forbes c.o.b. as Forbes Janitorial Services (Respondents) (*Granted*)

2335-88-R: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by the Ministry of Transportation, and Dunning Paving Ltd. (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3434-87-R: Michael Van Landeghem, Tracy Van Landeghem, and Terry Manzutti (Applicants) v. Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Union Labourers' International Union of North America, Local 1036 (Respondents) v. 657752 Ontario Inc. c.o.b. as Double S Construction (Intervener) (*Dismissed*)

0091-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sony Electronics Ltd. (Respondent) (15 employees in unit) (*Granted*)

3143-88-R: Bette J. Evans (Applicant) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Respondent) v. Alltour Marketing Support Services Ltd., Empro Corporate Services Inc. (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the employer in the City of Mississauga, save and except foremen and forewomen, persons above the rank of forewoman and foreman, drivers, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (77 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	49
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	48

3228-88-R: Sprio Brokalakis (Applicant) v. Millworkers, Local 802 - United Brotherhood of Carpenters & Joiners of America (Respondent) v. Heyme Wood Products Ltd. (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Heyme's Wood Products Limited at 242 St. Arnaud Street, save and except foremen, and persons above the rank of foreman, office workers, engineers, caretakers and watchmen" (4 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

0160-89-R: John Looman (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 141 (Respondent) v. Moffatt & Powell Ltd. (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Moffatt & Powell Limited at London, Ontario, save and except assistant managers, persons above the rank of assistant manager, office, and clerical staff, salesmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	10
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Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

0190-89-R: Ivan Norman (Applicant) v. Teamsters Local No. 141, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Moffatt & Powell Ltd. (Intervener)

Unit: "all employees of the Moffatt & Powell Limited at Tillsonburg, Ontario, save and except assistant managers, persons above the rank of assistant manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

0333-89-R: David Scott (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 27 (Respondent)

Unit: "all employees of [Highbury Ford Sales Limited] in London, Ontario, save and except tower operator, manager, service advisors, foremen, persons above the rank of foremen, office and sales staff" (30 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	30
Number of ballots marked in favour of respondent	16
Number of ballots marked against respondent	14

0510-89-R: Patel Rajendre (Applicant) v. United Headwear Optical & Allied Workers of Canada, Local 4 (Respondent)

Unit: "all employees of Aoco Limited/Limitee at its Branch at 890 Progress Avenue in Scarborough, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, and sales staff, and students employed during the school vacation period and part-time employees working less than 20 hours per week" (42 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	40
Number of persons who cast ballots	39
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	24

0548-89-R: Michael Waters (Applicant) v. Food & Service Workers of Canada, Local 53 (division of Canadian Textile & Chemical Union) (Respondent) v. Edwards Books & Art Ltd. (Intervener) (28 employees in unit) (*Dismissed*)

0814-89-R: Carlos Valente (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. J. Sousa Contractor Ltd. (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1042-89-U: Weston Bakeries Ltd. (Eastern Avenue Plant) (Applicant) v. Kevin Calhoun, An Tan Chiem, Jose Cubias, Frank Frankovich, G. Heseltine, B. Larkin, Jim Nitsopoulos, Bob Kawahara, Henry Cormann and Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0983-89-U: Atlantic Packaging Products Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463, Chris Burrows and Brian Christie (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0969-89-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Northern Stores Inc. (c.o.b. as Hudson's Bay Company Marathon, Ontario) (Respondent) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0573-87-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

3156-87-U; 3367-87-U: Canadian Textile & Chemical Union (Complainant) v. Brown Manufacturing Ltd. (Respondent) (*Dismissed*)

0469-88-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Complainant) v. Jermark Plumbing & Mechanical Services Ltd. (Respondent) (*Withdrawn*)

1352-88-U: Labourers' International Union of North America, Local 506 (Complainant) v. Grant Construction, Division of Malachy Grant & Associates Ltd. (Respondent) (*Withdrawn*)

1418-88-U: Teamsters Local 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Cannet Freight Cartage Ltd. (Respondent) (*Withdrawn*)

1743-88-U: Levert & Associates Contracting Inc. (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Respondent) (*Withdrawn*)

2320-88-U: Normand Dechamps (Complainant) v. Association of Professors of the University of Ottawa (Respondent) v. The University of Ottawa (Intervener) (*Dismissed*)

2701-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. U-Need-A-Cab Ltd. (Respondent) (*Withdrawn*)

2711-88-U; 3099-88-U; 3318-87-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 571252 Ontario Ltd. (c.o.b. as the Red Dog Inn, Fort Frances) (Respondent) (*Withdrawn*)

2897-88-U: Teamsters Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Peter Gorman & Sons (Wholesale) Ltd., & Peter Gorman (Respondents) (*Withdrawn*)

2982-88-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Sears Canada Inc. (Respondent) (*Withdrawn*)

3100-88-U: Ontario Public Service Employees Union (Complainant) v. St. Thomas-Elgin Association for Community Living (Respondent) v. Sergeant Steve Withenshaw C.I.B. (Intervener) (*Withdrawn*)

3154-88-U: Brian Christoph (Complainant) v. Canadian Auto Workers Canada Local 124 (Respondent) v. Titan Proform Co. (Intervener) (*Dismissed*)

0069-89-U: United Steelworkers of America (Complainant) v. Maxville Manor (Respondent) (*Withdrawn*)

0134-89-U: Service Employees International Union, Local 532 (Complainant) v. Flamboro Downs Holdings Ltd. (Respondent) (*Withdrawn*)

0177-89-U: Christian Labour Association of Canada (Complainant) v. West Lincoln Memorial Hospital (Respondent) (*Withdrawn*)

0343-89-U: Erik Hansink (Complainant) v. Doug Crough, Garry Murphy, Committeemen of C.A.W., Local 222 (Respondent) (*Withdrawn*)

0377-89-U: Kiflay Yemaneab (Complainant) v. Canadian Union of Public Employees, Local 1144 (Respondent) v. St. Joseph's Health Centre (Intervener) (*Withdrawn*)

0426-89-U: Shirley Cox (Complainant) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees Local 351 (Respondent) (*Withdrawn*)

0431-89-U: Johnson Controls Ltd. (Complainant) v. Russell St. Eloi, Sean O'Ryan, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada and its Locals 628, 508, 800, 552, 663, 593, 527, 666, 67, 599, 46, 221, 463, 71 and 819 (Respondents) (*Withdrawn*)

0448-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Century Fence Ltd. (Respondent) (*Withdrawn*)

0457-89-U: United Rubber, Cork, Linoleum & Plastic Workers of America (Complainant) v. Furst International Corporation (Respondent) (*Withdrawn*)

0490-89-U: Kevin Cassidy (Complainant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 835 (Respondent) (*Dismissed*)

0511-89-U: Julius Luptowitsch (Complainant) v. Ron Last Business Agent for Sarnia Local 1590; Painters & Allied Trades - Sarnia Local 1590; Painters & Allied Trades - Ontario Council of International Brotherhood of Painters & Allied Trades (Respondents) (*Withdrawn*)

0545-89-U: Edward Robitaille, employee, (Complainant) v. Frank Gallant, Union President; Lynn Whidden, Union Vice President; Local 863, The International Assoc. of Machinists & Aerospace Workers (Respondents) (*Withdrawn*)

0549-89-U: Peterborough Typographical Union, L. 248 Printing, Publishing, & Media Workers Sector of the Communications Workers of North America (Complainant) v. Gordon Brooks Holding Inc. c.o.b. as Lindsay This Week & as Victoria County News (Respondent) (*Withdrawn*)

0553-89-U: Canadian Paperworkers Union (Applicant) v. Code Felt Ltd. (Respondent) (*Withdrawn*)

0555-89-U: International Union of Operating Engineers, Local 793 (Complainant) v. Crushall Aggregates Ltd. (Respondent) (*Withdrawn*)

0567-89-U: Daniel Raymond Berthiaume (Complainant) v. Fabricated Steel and CAW Local 195 (Respondent) (*Dismissed*)

0568-88-U: Labourers' International Union of North America, Local 183 (Complainant) v. 1855 Jane Ltd. & Perfect Metro Cleaners (Respondents) (*Withdrawn*)

0572-89-U: Edward H. Lee (Complainant) v. C.E.C. Liquids Inc. (Respondent) (*Dismissed*)

0582-89-U: Brian Hopper (Complainant) v. Culinar Inc. & GCO Emp. Association (Respondents) (*Withdrawn*)

- 0584-89-U:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Plate-Way Ltd. (Respondent) (*Withdrawn*)
- 0607-89-U:** Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. Talisman Motor Inn (Respondent) (*Withdrawn*)
- 0608-89-U:** Donna Elaine Cole (Complainant) v. United Rubber, Cork, Linoleum & Plastic Workers of America, Local No. 536 (Respondent) v. General Tire Canada Inc. (Intervener) (*Withdrawn*)
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- 0634-89-U; 0635-89-U:** International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Levert & Associates Contracting Inc. Briecan Construction Ltd. (Respondent) (*Withdrawn*)
- 0662-89-U:** International Union of Operating Engineers Local 793 (Complainant) v. ICG Liquid Gas Ltd. (Respondent) (*Withdrawn*)
- 0680-89-U:** Steven W. Zoskey (Complainant) v. Graphic Comm. Int. Union - C274 (Respondent) (*Withdrawn*)
- 0707-89-U:** IWA-Canada (Complainant) v. Century Kitchens Inc. (Respondent) (*Withdrawn*)
- 0727-89-U:** Service Employees' Union, Local 210, affiliated with Service Employees' International Union AFL-CIO-CLC (Complainant) v. The Salvation Army, Windsor, Ontario (Respondent) (*Withdrawn*)
- 0728-89-U:** Judith Anne Servos (Complainant) v. Linda Sacco, George Wilson, CUPE, Local 2369 (Respondent) (*Withdrawn*)
- 0741-89-U:** Service Employees' Union, Local 210 affiliated with the Service Employees' International Union, AFL-CIO-CLC (Complainant) v. Golden Gate Lodging Home Inc. (Respondent) (*Withdrawn*)
- 0774-89-U:** Joseph O. Bergeret (Complainant) v. International Brotherhood of Painters & Allied Trades, Local 1904 & The Ontario Council of International Brotherhood of Painters & Allied Trades (Respondents) (*Withdrawn*)
- 0820-89-U:** Janice B. Chisholm (Complainant) v. Phillip Paul (Respondent) (*Withdrawn*)
- 0881-89-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Birchwood Terrace Nursing Home (Respondent) (*Withdrawn*)
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- 0899-89-U:** IWA-Canada (Complainant) v. Century Kitchens Inc. (Respondent) (*Withdrawn*)
- 0929-89-U:** Patricia Halladay (Complainant) v. Unspecified (Respondent) (*Dismissed*)
- 0946-89-U:** Drago Dobric (Complainant) v. Canada Packers Co. Ltd. (Respondent) (*Dismissed*)
- 0958-89-U:** Cindy Hayes, Mary Beth Mailloux, Pay Beveridge, Ana Avila (Complainants) v. Diane Brown et al (Respondent) (*Dismissed*)
- 0988-89-U:** Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Complainant) v. Metroland Printing, Publishing & Distributing, a Division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0416-89-M: Westburne Industrial Enterprises Ltd. (Employer) v. Teamsters Local No. 419 (Trade Union) (*Granted*)

0481-89-M: Work Wear Corporation of Canada Ltd. Waterloo, Ontario (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (formerly Laundry, Dry Cleaning & Dye House Workers' International Union Local 351) (Trade Union) (*Granted*)

0594-89-M: Rexcan Circuits Inc. (Employer) v. The National Automobile, Aerospace & Agricultural Implementation Workers Union of Canada (CAW-Canada) & its Locals 1839 & 1530 (Trade Union) (*Granted*)

0870-89-M: Work Wear Corporation of Canada Ltd. (Anchor Textile Division) (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

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0783-89-M: Janice Chisholm (Applicant) v. A.G. Simpson Plant Council Executives (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1993-87-JD: The International Longshoremen's Association, Local 1477 (Complainant) v. The Canadian Paperworkers Union, Local 84 and Quebec & Ontario Paper Company Ltd. (Respondents) (*Granted*)

1569-88-JD: Harold R. Stark Division of William Stark Group Inc. (Complainant) v. Sheet Metal Workers International Association, Local 392 & United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0184-88-M: Vaughan Glen Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

2415-88-M: Canadian Union of Public Employees, Local 1758 (Applicant) v. Margaret Cochenour Memorial Hospital (Respondent) (*Granted*)

0115-89-M: Canadian Textile & Chemical Union (Food & Service Workers Division) (Applicant) v. Windsor Arms Hotel Corporation (Respondent) (*Withdrawn*)

0135-89-M: The Ontario Cancer Treatment & Research Foundation/Thunder Bay Clinic (Applicant) v. The Ontario Nurses' Association (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0049-88-OH: Robert McIntyre (Applicant) v. Zalev Brothers Ltd. (Respondent) v. United Steelworkers of America (Intervener) (*Dismissed*)

0227-89-OH: George Marks (Complainant) v. Canadian Pacific Forest Products Ltd. (Respondent) (*Withdrawn*)

0359-89-OH: Albert Parsons (Complainant) v. Northfield Metal Products Ltd. (Respondent) (*Dismissed*)

0746-89-OH: Ontario Public Service Employees Union (Complainant) v. Ministry of Correctional Services (Respondent) (*Withdrawn*)

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1177-88-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Harold R. Stark Division of William Stark Group Inc. (Respondent) (*Withdrawn*)

2643-88-G; 2827-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Anzano Construction Ltd. (Respondent) (*Withdrawn*)

2864-88-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Stone & Webster Canada Ltd. (Respondent) v. The Ontario Erectors Association (Intervener) (*Dismissed*)

2988-88-G: Labourers' International Union of North America, Local 506 (Applicant) v. Runnymede Development Corp. Ltd. (Respondent) (*Granted*)

0045-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fermar Paving Ltd. (Respondent) (*Withdrawn*)

0064-89-G: United Brotherhood of Carpenters' & Joiners of America, Local 27 (Applicant) v. M.P.S. Carpentry Services (Respondent) (*Granted*)

0067-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. New Professional Carpenters (Respondent) (*Granted*)

0102-89-G; 0437-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Crest Drywall & Acoustics Ltd. (Respondent) (*Granted*)

0116-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ken Pierman Contracting Inc. (Respondent) (*Withdrawn*)

0184-89-G: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Joe Davis Electric; Davis Electrical Contracting Ltd.; Sunset Electrical Contracting; Merrick Mechanical (761723 Ontario Inc.) (Respondents) (*Withdrawn*)

0202-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 607015 Ontario Inc. (Respondent) (*Withdrawn*)

0232-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2965 (Applicant) v. 757900 Ontario Inc. c.o.b. U-Flooring Contracting (Respondent) (*Withdrawn*)

0263-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. A.B.B.L.O. Construction Inc. and J.R. Noel Plastering Ltd. (Respondents) (*Withdrawn*)

0265-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. L.P.S. Excavating & Grading; 720419 Ontario Ltd. (Respondent) (*Withdrawn*)

0305-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Withdrawn*)

0312-89-G: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. W. G. Gallagher Construction Ltd. (Respondent) (*Granted*)

0338-89-G: Labourers International Union of North America, Local 506 (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

0390-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bradley Campbell Interiors (Respondent) (*Withdrawn*)

0391-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Harlech Renovations (Respondent) (*Withdrawn*)

0392-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Silverwood Enterprises/Structural Ltd. (Respondent) (*Withdrawn*)

0460-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Thomas Fuller Construction Co. (1958) Ltd. (Respondent) (*Granted*)

0495-88-G: United Brotherhood of Carpenters' & Joiners of America, Local 27 (Applicant) v. G. Halcovitch Carpentry Ltd. (Respondent) (*Granted*)

0526-89-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Stone & Webster (Respondent) (*Withdrawn*)

0577-89-G: United Brotherhood of Carpenters & Joiners of America, Local 1946 (Applicant) v. Ivan Forster, c.o.b. as Unique Installations & 447244 Ontario Ltd. c.o.b. as AMCOL &/or as The Atrium Manufacturing Company of London (Respondents) (*Granted*)

0610-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. H.G. Susgin Construction (Respondent) (*Withdrawn*)

0624-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Helmut Kruschat Construction (Respondent) (*Granted*)

0626-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 705008 Ontario Ltd. (Respondent) (*Withdrawn*)

0678-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Itarcan Construction Inc. (Respondent) (*Granted*)

0683-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Anzano Construction Ltd. (Respondent) (*Withdrawn*)

0684-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Victoria Carpentry Ltd. (Respondent) (*Dismissed*)

0699-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sinclair Welding Ltd. (Respondent) (*Granted*)

0747-89-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Dilfo Mechanical Ltd. (Respondent) (*Withdrawn*)

0754-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dufferin Construction Company (a Division of St. Lawrence Cement Inc.) (Respondent) (*Granted*)

0762-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Central Millwork Ltd. (Respondent) (*Withdrawn*)

0792-89-G: The International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades Local 1494 (Applicant) v. Cassolato Painting & Decorating Ltd. (Respondent) (*Granted*)

0793-89-G: International Union of Operating Engineers Local 793 (Applicant) v. Sandercock Construction (1976) Ltd. (Respondent) (*Withdrawn*)

0794-89-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Tornado Insulation Ltd. (Respondent) v. Operative, Plasterers & Cement Masons International Association of the United States & Canada, Local 915 (Intervener) (*Withdrawn*)

0797-89-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Bar - Mik Erectors Ltd. (Respondent) (*Granted*)

0804-89-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Raymond Steel Ltd. (Respondent) (*Withdrawn*)

0833-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Briecan Const. Ltd. (Respondent) (*Dismissed*)

0838-89-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Centennial Railings Ltd. (Respondent) (*Withdrawn*)

0845-89-G: Labourers' International Union of North America, Local 607 (Applicant) v. 686807 Ontario Inc. o/a The Cencan Group (Respondent) (*Granted*)

0859-89-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Rosmar Dry-wall & Acoustics Ltd. (Respondent) (*Dismissed*)

0924-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Ottawa GSB Construction Co. Ltd. (Respondent) (*Withdrawn*)

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0926-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. D'Angelo Plastering Co. Ltd. (Respondent) (*Withdrawn*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1989



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
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EDITOR: COLLEEN EDWARDS

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Judicial Review - Certification - Charter of Rights and Freedoms - Constitutional Law - Employees working under conditions akin to those in a factory - Employees responsible for monitoring the development of embryonic chickens - Employees found by Board to be persons employed in agriculture - Board holding that it has jurisdiction to entertain union's challenge that exclusion of persons employed in agriculture is contrary to the Charter - Employer bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law in finding itself to be a "court of competent jurisdiction" and in finding it has the authority to apply the Charter by virtue of s.52 of the *Constitution Act, 1982* - Judicial review dismissed by Divisional Court - Appeal dismissed by Court of Appeal.

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2937-87-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Allied Signal Automotive of Canada Inc., Respondent v. Group of Employees, Objectors

Certification - Representation Vote - Objectors requesting that results of representation vote be set aside and a new vote conducted due to union electioneering and intimidating conduct - Electioneering conducted by both union and objectors - No intimidation of voters by union in polling area - Conduct complained of not affecting secrecy of vote - Board not setting vote aside

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *W. A. Correll* and *D. A. Patterson*.

APPEARANCES: *John Moszynski* and *Wayne McKay* for the applicant; *Bruce Binning* and *Tom Patterson* for the respondent; *M. Mitchell* and *Karen Mitchell* for the objectors.

REASONS FOR DECISION; September 29, 1989

1. A representation vote was conducted in connection with this certification application on March 9, 1989. By letter dated March 16, 1989, counsel for the objectors alleged there had been "irregularities concerning the taking of the vote". Those allegations and the objectors' request that the results of the vote be set aside and a new vote conducted where the subject of four days of evidence and argument which concluded on May 25, 1989. In an oral ruling delivered that day, we rejected the objectors' request. We indicated at that time that reasons for our decision would be delivered in writing in due course, if requested. Counsel for the objectors has so requested.

2. The objectors' allegations of irregularity are summarized in five numbered paragraphs in their counsel's letter to the Board of March 16, 1989:

1. The Union challenged the inclusion of Mr. Jim Osier as part of the proposed bargaining unit immediately prior to the vote without reasonable cause and contrary to an agreement it had entered into with the objectors. The Union challenge was known in the plant, and had the effect of causing confusion in the plant and fostering the idea that the Union was controlling the vote.
2. The Union disseminated electioneering material immediately prior to the vote. The Union continued to electioneer up to and during the taking of the vote.
3. Members of the Union, including members of its organizing committee, specifically Mr. Bill Flick, also one of its representatives for the counting of the vote, placed themselves in the cafeteria immediately outside the door of the polling area during a significant part of the period of time that the voting was taking place, which had the effect of intimidating and harassing employees casting their ballots.
4. The writer, prior to the commencement of the vote, advised the Returning officer of the electioneering material being worn by members of the organizing committee, and as to their location immediately outside the polling area. Although I am advised the Returning Officer spoke to said employees, she did not ask them to remove themselves from the area, nor did she insist they immediately remove electioneering material. On the other hand, the writer was requested by the Returning Officer to remove himself from the area of the vote, to which request he immediately complied.
5. The company allowed electioneering material and electioneering to be done by Union supporters during working hours throughout the plant up to and including the day of the vote. The objectors were advised not to do so.

3. The Board's decision directing the conduct of a representation vote referred the matter

of arrangements for the conduct of the vote to the Registrar in accordance with section 68 of the Board's Rules of Procedure. In accordance with the usual practice, the Registrar requested that the parties meet in an attempt to agree on the list of eligible voters and the time, place, date and other arrangements for the conduct of the vote. The parties met for that purpose on or about February 21, 1989. One of the matters discussed was whether, as the union's representatives then contended, Jim Osier was excluded from the bargaining unit because his job involved the exercise of managerial functions. By the end of the meeting, the union's representatives had agreed that his name would be put on the voter's list as a person who was an employee in the bargaining unit as of February 7, 1989. The parties' handwritten agreement with respect to vote arrangements was received by the Registrar on February 22, 1989. She arranged for the conduct of the vote in accordance with that agreement.

4. The vote was conducted on March 9, 1989. Polls were conducted in the cafeteria conference room at the respondent's plant between 6:00 and 9:00 a.m. and between 2:00 and 4:30 p.m. Jim Osier attended to vote during the morning poll. His eligibility to vote was challenged at that time by the person in attendance as the union's scrutineer. The objector's scrutineer questioned the propriety of this challenge. Following the practice applicable whenever any challenges are made to the eligibility to vote of any person seeking to do so, the Board's Returning Officer permitted Jim Osier to mark a ballot but segregated the ballot rather than permit it to be deposited in the ballot box. In the course of so doing, she explained to Mr. Osier the double envelope procedure followed by the Board whenever ballots are segregated in order to preserve the secrecy of the ballot. (A description of this procedure may be found in the Board's decision in *The Board of Education for the City of Toronto*, [1983] OLRB Rep. July 1229, at ¶6.) There were other voters in the polling area when these events occurred.

5. The union's challenge to Mr. Osier was abandoned at the beginning of our hearings in May. As a result, we do not know on what grounds it was made. The Board has not generally permitted a party to resile from an agreement on voter eligibility. It may be that the challenge would have been rejected on that ground had it been pursued by the applicant.

6. It is in the nature of representation proceedings and representation votes that there will be occasions on which the eligibility to vote of particular individuals will be a matter of dispute which cannot be resolved until after the vote is conducted. Lists of eligible voters agreed upon by an applicant and respondent and, perhaps, a group of objectors, represent the position of the parties to that agreement on the matter of eligibility, not a final decision of the Board on that issue. Both the Board's Notice of Taking of Vote and the additional notation stamped on voters lists recognize that eligibility questions may arise and should be directed to the Returning Officer. The Returning Officer's function when an eligibility dispute arises is not to determine it, but to ensure that effect may later be given to the view which ultimately prevails when the dispute is later determined by the Board. The Returning Officer does that by permitting anyone to mark a ballot who claims the right to do so and segregating the ballots of those whose right to vote is in dispute.

7. The essential characteristic of a representation vote is the secrecy of balloting. The voter is assured that the Board will so conduct the voting as to ensure that none of the participants will learn how he or she marked a ballot. A voter who observed the events leading to segregation of Jim Osier's ballot might have concluded, quite correctly, that the union's scrutineer was in a position to challenge a voter's eligibility and, by so doing, control whether a ballot would be placed in the ballot box immediately or segregated to await further determinations by the Board. There would have been no reason for the voter to suppose that the union was the only participant capable of having this effect on the process. In any event, the challenge to Jim Osier and segregation of his ballot would not have given voters any objective reason to suppose that the union or any other par-

ticipant could find out how they marked their ballots or in any other way tamper or interfere with the balloting process. We were not persuaded that the union's challenge to the inclusion of Mr. Osier rendered the results of the vote unreliable.

8. In support of the allegation in paragraph numbered 5 of their counsel's letter of March 16, 1989, the objectors alleged that through one of its supervisors, Mr. Bill Flick Sr., the company allowed a union supporter, Maggie Paulus, access to the plant after her normal shift on March 8th and 9th for the purpose of electioneering. Evidence in support of this allegation was to the effect that Maggie Paulus was seen in the plant talking to fellow employees in the early morning hours of both March 8th and 9th at times when she was not scheduled to be at work. Witnesses testified that Bill Flick Sr. must have been in a position to observe her there but they did not see him take any action to remove her. One witness testified that on one of these occasions she saw Ms. Paulus with brown bags in her hand and overheard her say to another employee that the bags contained union stickers.

9. The objectors called Bob Bree, the plant superintendent for the night shift, to testify about the activities of Maggie Paulus. His evidence was that he had heard rumours of her having been in the plant beyond her normal work hours on March 8th, although he had not seen her himself. He did see her there on the morning of March 9th at 2:20 a.m., after the end of her shift. He testified that when he pointed her out to Bill Flick Sr., Mr. Flick's response was "we better get her out." Mr. Bree dealt with that himself. He spoke to Ms. Paulus and, after verifying that she did not have a work-related reason for remaining on the premises, asked her to leave. She put on her coat and boots and headed for the door. If she returned later, as other witnesses suggest, Mr. Bree was not aware of it.

10. There is no evidence that Ms. Paulus did anything on these occasions other than talk to fellow employees. Apart from the overheard reference to bags containing stickers, there is no direct evidence about the content of any of those conversations. Maggie Paulus may well have been electioneering on the mornings of March 8th and 9th in support of the union. The evidence leaves us in some doubt about whether the behaviour of Bill Flick Sr. would have given other employees the impression that he was aware of and tolerated such after-hours electioneering on the plant floor. In any event, given the evidence of Mr. Bree and our familiarity with the events which preceded the order directing a representation vote, we are satisfied that no rational employee in this workplace would have thought that the respondent was supporting the union's campaign. Any action by Bill Flick Sr. which might have appeared supportive of the union would have been interpreted and understood as personal to him and not reflective of the attitude of management. We are satisfied that the respondent neither allowed nor tolerated from union supporters any form of behaviour which was not equally tolerated when engaged in by union opponents.

11. The workers in this workplace are no strangers to "electioneering" by union supporters and opponents both, as will be apparent from the Board's decision of February 7, 1989. After that decision directed that a representation vote be conducted, the union and the objectors engaged in further electioneering. Its supporters continued to wear their CAW T-shirts. New T-shirts with a "Vote Yes" message appeared on the scene. There were also "Vote Yes" buttons. The objectors responded by handing out "Vote No" buttons. The union disseminated further pamphlets and flyers. The objectors did the same. Union supporters and opponents continued to speak to fellow employees. Sometimes the discussions were welcome, sometimes not. There is no evidence from which we could conclude that unwelcome discussions involved intimidation, coercion, harassment or haranguing.

12. The polling area on which the objections, applicant and respondent agreed in mid-Feb-

ruary was the cafeteria conference room, a section of the plant cafeteria which can be partitioned off by means of a hanging movable wall. The wall was moved into place for the vote, leaving an opening of doorway width facing the cafeteria. The polling area was arranged so that the table occupied by Returning Officer and scrutineers was at the end of the polling area closest to that doorway opening, where that table and persons at it could be seen from the cafeteria. The polling booths were placed at the opposite end of the polling area, where they could not be seen by anyone seated at the tables in the cafeteria. Whatever electioneering may have taken place elsewhere in the plant, it is apparent from the evidence that the Returning Officer was vigilant to ensure that none occurred in the agreed-upon polling area. While serving in the polling area in that capacity, scrutineers were not allowed to display any arguably partisan message on their clothing. It is obviously for that reason that Karen Mitchell was told to remove a smock bearing the Fram name or logo. Each side was advised that voters would have to remove or cover up partisan materials before entering the polling area itself. Some union supporters wore their slogans as far as the part of the cafeteria outside the polling area. The objectors chose to advise their supporters to remove their slogans before they reached the cafeteria. The objectors gave themselves the advice referred to in the last sentence of paragraph numbered 5 of their counsel's letter of March 16, 1989.

13. Bill Flick Jr. is a bargaining unit employee. He is a vociferous union supporter. His behaviour toward the objectors during their circulation of the anti-union petition a year earlier was the subject of evidence in the proceedings which led to our directing the representation vote. He works the day shift, which beings at 7:00 a.m. He arrived at work before 6:00 a.m. on March 9th, so he could be in the cafeteria when the poll opened. He and some other union supporters sat at the cafeteria table closest to the entrance to the polling area. The objectors led evidence to the effect that this was not the table at which Mr. Flick normally sat when he was in the cafeteria. Some of those at that table had "Vote Yes" T-shirts or buttons. There is conflicting evidence about exactly what Bill Flick Jr. was wearing.

14. The lawyer who has acted for the objectors in these proceedings attended at the cafeteria that morning before the poll opened. Ms. Mitchell testified that she saw him speak to the Board's Returning Officer. She heard him say something about "the guys outside the door", but offered no particulars as to what was said. She did not hear the Returning Officer's reply. Her lawyer did not testify; we have no other direct evidence of the content of that conversation. Bill Flick Jr. testified that the Returning Officer approached him shortly before the poll opened and advised him and the others seated with him that they would have to remove or cover up any partisan messages on their clothing when they attended in the polling area. She made no comment to him or any of the others about the propriety of their sitting in that location.

15. Mr. Flick and his companions were among the first to vote. After doing so, Mr. Flick returned to the cafeteria table closest to the doorway into the polling area, and remained there until shortly before his shift began at 7:00 a.m. At some point during that period he went into the polling area and offered to get coffee for the Returning Officer and each of the scrutineers. The offer was declined by Ms. Mitchell, but accepted by the others. Although he did not request it of her, the Returning Officer insisted on reimbursing Mr. Flick for the cost of the coffee he brought her. This coffee incident occurred at a time when there were no voters in the polling area.

16. There was some difference of opinion about the distance between Bill Flick Jr. and the entrance to the polling area when he was seated at the table outside that entrance. Estimates ranged from 6 to 12 feet. Witnesses called by the objectors testified that they were uncomfortable about having to walk past Mr. Flick in order to vote. It was suggested that his presence was "intimidating". It was common ground, however, that from where he sat he could not see the polling booths where voters went to mark their ballots. Karen Mitchell testified that she did not like the

fact that Mr. Flick was sitting outside the polling area, but did not complain about it to Mr. Flick or to the Returning Officer. Mr. Flick testified that no one made any complaint to him about his sitting at that table. Although it was alleged in his letter to the Registrar that the objector's lawyer complained about this to the Returning Officer, he did not testify to that effect when the opportunity to do so arose.

17. There is no evidence that Mr. Flick's presence deterred any eligible voter from voting. He was outside the polling area for less than one hour out of the five and one half hours during which employees could vote. Four hundred and twenty-three people voted; there was testimony that about fifty of those would have voted while Mr. Flick was seated near the entrance to the polling area. Of those who testified to feeling uneasy about voting in those circumstances, none suggested that the way they marked their ballot had been affected by his presence. We are invited to conclude, however, that others might have been so affected.

18. While he was in the cafeteria that morning, Mr. Flick did not do or say anything which could fairly be described either as intimidating voters or as engaging in electioneering. He did have some conversations with some individuals. One of the objectors' witnesses testified that as one of the voters emerged from the polling area, Mr. Flick thanked him "for his vote" and wished him a good holiday. Mr. Flick testified, and we find, that he thanked that particular voter for taking time out of his holiday to attend to vote.

19. Section 68 of the Board's Rules of Procedure provides that the Registrar may

- (j) direct all interested persons to refrain and desist from propaganda and electioneering during the day or days the vote is taken and for seventy-two hours before the day on which the vote is commenced.

It was for many years the Board's policy and practice that the Registrar would give a direction of this sort in every case. The time period described in subsection (j) came to be known and referred to as "the silent period". There was much litigation over allegations of breach of the silent period and the consequences which should flow from breach of the Registrar's direction. With many years' experience, the Board came to the view that such directions created more problems than they solved. The policy of imposing a "silent period" in every case was changed on a trial basis in July of 1983. On November 29, 1984, the Board issued the following policy statement:

BOARD POLICY RELATING TO THE SILENT PERIOD

In July of 1983, the board reviewed its policy relating to the normal 72 hour "silent period" preceding a representation vote and was of the opinion that litigation over alleged breaches of the "silent period" often prolonged certification proceedings unnecessarily. The Board concluded that the imposition of a "silent period" before a representation vote should be dispensed with, but considered it advisable to implement this change of policy for a trial period of one year. Having closely monitored the impact of the change during this trial period, the Board has decided to adopt the policy of not imposing a "silent period", as its regular practice. The Registrar of the Board, nevertheless, retains the right under section 68(j) of the Board's Rules of Procedure to impose a "silent period" in particular cases.

The Board reiterates that the dispensation of the "silent period" should *not* be seen as permitting "wide open" campaigns by parties to a vote. Rather, it is intended to eliminate litigation over technical violations. The Board will, of course, continue to deal with any submissions or complaints alleging that a representation vote has been improperly affected by the conduct of the parties or other persons.

None of the parties to this application asked that the Registrar exercise her powers under subsection 68(j) of the Board's Rules of Procedure, and there was no such direction in this case. It fol-

lows that none of the behaviour complained of by the objectors violated any specific direction of the Board with respect to the conduct of this representation vote.

20. We accept that Mr. Flick's proximity to the polling area made some voters uncomfortable. Had the Board known that there would be complaints made and hearing time consumed over anyone's sitting at any particular distance from the polling area entrance, it or the Registrar might have made directions requiring or requesting that employees remain at some distance from the polling area when not actually voting. There is no suggestion that the Board was in a better position to anticipate this problem than the parties themselves, who neither anticipated it nor complained of it when it occurred. The issue at this stage, however, is not whether some voters were uncomfortable. The issue is whether the conduct complained of destroyed the secrecy of the ballot or created a situation in which the vote is not likely to disclose the true wishes of the employees: *Stauffer-Dobbie Manufacturing Company*, 59 CLLC ¶18,147; *Scarborough Centennary Hospital Association*, [1979] OLRB Rep. April 350, at ¶4; and, *Northfield Metal Products Ltd.*, [1989] OLRB Rep. Jan. 57, at ¶7.

21. At the conclusion of evidence and argument on May 25, 1989, we were satisfied that, to the extent it was proven, none of the conduct complained of affected the secrecy of the vote or created a situation in which the vote would not have been likely to reveal the true wishes of employees. For these reasons, we were satisfied that the results of the representation vote conducted on March 9, 1989 should determine the outcome of this certification application.

0147-89-U Paul Balkos, Complainant v. Lawson Packaging Toronto, A Division of the Lawson Mardon Group Limited and Graphic Communications International Union, Local 500M, Respondents

Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Complainant alleging union did not represent him properly in having his seniority reinstated - Union moving for non-suit after complainant completing his evidence - Employer not joining in non-suit - Union submitting it should not be put to its election to call evidence - Putting union to its election would be futile because the employer could still call evidence - Board refusing to entertain non-suit motion - Complaint dismissed

BEFORE: *Patricia Hughes*, Vice-Chair.

APPEARANCES: *Paul Balkos* on his own behalf; *D. Francis*, *D. Larry Mogg* and *P. Jones* for Lawson Packaging Toronto, A Division of the Lawson Mardon Group Limited; *Michael Church*, *Jim Cowan* and *Ron Duquette* for Graphic Communications International Union, Local 500M.

DECISION OF THE BOARD; September 21, 1989

1. Paul Balkos was employed by the respondent employer, Lawson Packaging Toronto ("Lawson Packaging" or "the employer"), from June 22, 1984 or thereabouts until April 8, 1988 and again from August 15, 1988 until March 3, 1989. He claims that the period between April and August 1988 was a lay-off but that the company, in laying him off in March 1989, ignored his seniority. Seeking to have his seniority reinstated, he went to his union, the respondent Graphic Communications International Union, Local 500M ("the union" or "Local 500M"), and when the

union failed, in his view, to represent him adequately, he filed this complaint alleging that the union had breached section 68 of the *Labour Relations Act* ("the Act").

2. In his complaint, Mr. Balkos referred to "finding out company paid no dues and benefits after returning from 8/15/88 - 3/3/89"[sic]. By the time the hearing began, this issue apparently formed no part of the complaint and I make no further reference to it (with one exception on the question of whether Mr. Balkos quit or was laid off in 1988).

3. The union and the employer initially sought to have the complaint dismissed as untimely. Mr. Balkos did not enlist the union's help until March 1989 (the grievance was filed March 6, 1989, seeking the return of Mr. Balkos' seniority). At this point in the proceedings, Mr. Balkos said that he had a conversation with Max Avery, the day shift supervisor in finishing and his supervisor at Lawson Packaging, in March 1989 about seniority; that this was obviously an error did not become completely clear until some prolonged questioning of Mr. Balkos in cross-examination and it was revealed that the conversation definitely took place in August 1988. The complaint was filed on April 18, 1989, eight months after he was first advised there might be a problem with his seniority and one month after the union's involvement in the matter. Even at its longest, the length of delay is insufficient to dismiss the complaint as untimely as a preliminary matter.

4. After Mr. Balkos had completed his evidence, counsel for the union moved for a non-suit. The employer did not join in the motion for a non-suit, however. Counsel for the union contended that I should not put him to his election because Mr. Balkos' case was so weak that it was in the interests of all involved to bring a quick end to the proceedings. The decision to put counsel to his or election is within the discretion of the Board. In the usual case, for example, it may be considered preferable to ensure that the full case which is to be adduced by any party is in before making a determination on whether the complainant has made out his or her case. That will not be so where the respondent may subsequently call evidence; in such cases, the motion is in effect a request to let the respondent know just how things stand at that stage of the proceedings. To not require the respondent to make its election is akin to treating the motion as a preliminary motion that the complainant has not made out a *prima facie* case, a motion brought before any evidence is led. In addition, the "unfairness" in allowing the respondent to argue its case twice underlies putting the respondent to its election. There is also some concern, albeit not a predominant one in my view, that not requiring the respondent to decide how serious it is about its motion will encourage delays in the hearing through non-suit motions not attended by the certainty there will not be more evidence adduced. I indicated that I would put counsel to his election.

5. It then became relevant that counsel for the employer had not joined in the motion and had stated quite vigorously that he intended to call evidence. Had I found in favour of the union's motion and dismissed the complaint, the employer would, of course, be calling no evidence; but if I dismissed the motion, the employer could still call evidence: nothing could prevent its calling union officials as well as other witnesses. In section 68 cases, the employer and the union share a similar interest in each showing that not only itself, but the other of them has conducted itself appropriately. This is the reality of section 68 complaints even though it is the union's conduct which is primarily under analysis. From another perspective, the complainant is entitled to use any evidence called by either respondent to help make his or her case. Thus where there is evidence to be called, it is premature to rule on the motion until that evidence has been adduced. It would make putting the union to its election a futile requirement when there is another party quite capable and on the face of it, quite willing, to put in all the relevant evidence in any case. Since counsel for the employer desired to put the employer's version of the matter before me and therefore did not join in the motion for a non-suit, I refused to entertain the motion. In my view, reserving on

the motion has no practical purpose since by that point, the evidence and submissions would have been complete and one would be assessing the matter as in the usual course.

6. On Mr. Balkos' testimony, he desired to arrange his employment circumstances in order to reduce the financial obligations he might incur towards his ex-wife. Apparently, he was in the midst of legal procedures in that regard in the spring of 1988. Put simply, he wanted to ensure that he would show little income for that period, he says through lay-off, the employer says (as does the union) through quitting his job on April 8, 1988. In any event, he returned to work on August 15, 1988 and began his seniority as of that date; thus when Lawson Packaging laid off employees in March 1989, Mr. Balkos was on the lay-off list. He complained, arguing his seniority went back to 1984 and sought assistance from the union. The union filed a grievance on his behalf and took it to the third step of the grievance procedure. At the second step meeting, I find, despite Mr. Balkos' denial, that he agreed that he had quit. Prior to the third step meeting, James Cowan, a vice-president of Local 500M, explained to Mr. Balkos that he did not have a case and that he should accept a monetary package offered by the employer. Mr. Balkos stormed out of the meeting and the union withdrew the grievance.

7. I dismissed the complaint orally with reasons as set out below.

8. The version of the relevant events Mr. Balkos wanted me to accept was as follows: that he and the company in effect conspired to arrange his employment circumstances such as to deceive his ex-wife (and perhaps the courts) about his level of income by Mr. Balkos' going on lay-off out of seniority; that the employer subsequently reneged on that arrangement by treating him as a new employee at least as far as seniority was concerned and, as a consequence, laying him off in March 1989 when he would not have been laid off if he had retained his seniority from 1984; and that when he asked the union to help him enforce this arrangement with the employer, the union failed to do so to his satisfaction or in effect, conspired with the employer to renege on the "deal" originally made between the employer and Mr. Balkos.

9. Whether the union would or could be found lax in its duty under section 68 for failing to enforce such an arrangement is not something I have to decide since I reject Mr. Balkos' version of the events of the spring of 1988. I do not accept that the employer laid Mr. Balkos off in order to assist him in his marital difficulties. The evidence before me is that he was paid vacation pay and that when he returned he was given a seniority date of August 15, 1988. It is common ground that in August 1988, Mr. Avery said in a telephone conversation that Mr. Balkos would come back as a new employee or that he might lose his seniority. (I had no evidence as to whether he was put on probation for three months or was required to pay union dues for that time.) His Record of Employment does show he was laid off for "shortage of work" rather than that he quit. I accept that that was the result of Alberta Smith's, the payroll clerk at Lawson Packaging, wanting to assist Mr. Balkos in receiving unemployment insurance benefits. Mr. Balkos was on notice that his seniority was a problem as of August 1988 but did nothing until he was laid off in March 1989. At that time, the union helped him until he stormed out of the meeting.

10. Mr. Balkos could offer no reason why the union did not proceed further other than the reason given to him by Mr. Cowan; he made no allegation that could be interpreted as an allegation that the union had acted arbitrarily or in bad faith or had discriminated against him on any basis. When I asked him if he thought the union "had anything against him", he said "I don't know, no".

11. Therefore, I dismiss the complaint.

2718-87-R International Union of Bricklayers and Allied Craftsmen, Local 2, Applicant v. The Corporation of the City of Etobicoke Public Library Board, The Corporation of the City of Etobicoke, Respondents

Construction Industry - Related Employer - Bricklayers Union alleging that City and Library Board were under common control or direction - Library Board established by statute in 1950 - Union members not used by Library Board when it constructed a library - Whether Board ought to exercise its discretion in favour of making a common employer declaration - Operations of two entities not integrated - Labour relations community treating similar entities as separate employers - Board dismissing application - Circumstances not warranting common employer declaration

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. G. Wozniak* and *D. A. Patterson*.

APPEARANCES: *Bernard Fishbein*, *John Robbins* and *Louis Ponikvar* for the applicant; *Nancy A. Eber*, *Nancy M. Hall* and *Albert P. Singh* for the respondent, The Corporation of the City of Etobicoke Public Library Board; *M. P. Moran*, *L. A. S. Riddell* and *G. H. Metcalfe* for the respondent, The Corporation of the City of Etobicoke.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND BOARD MEMBER D. G. WOZNIAK:
September 29, 1989

1. This is an application in which it is alleged that there has been a sale of a business from the Corporation of the City of Etobicoke ("the City") to the Corporation of the City of Etobicoke, Public Library Board ("Library Board"), and that the Library Board is the successor employer to the City in accordance with section 63 of the *Labour Relations Act* ("the Act"). In the alternative, it is alleged that the City and the Library Board carry on associated and related activities or businesses, are under common direction or control, and, for purposes of the Act, ought to be treated as one employer pursuant to section 1(4) of the Act.

2. At the conclusion of the evidence, and before the submissions of the parties, counsel for the applicant, International Union of Bricklayers and Allied Craftsmen, Local 2 ("the Union") indicated that the union would not be making any submissions or assertions in respect of the application filed pursuant to section 63 of the Act. As the union did not pursue that portion of its application, and having regard to the evidence before us, we hereby dismiss the union's application made pursuant to section 63 of the Act.

3. The union was certified as bargaining agent for all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the City in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in Ontario Labour Relations Board Area No. 8 for all other sectors of the construction industry by certificates dated November 8, 1983. As a result, the City is bound to the collective agreement between the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario, effective from May 1, 1986 to April 30, 1988 ("the collective agreement").

4. In the fall of 1987, certain construction commenced at a site known as the Elmbrook Park Library in the City of Etobicoke. The union grieved that the City was in violation of the collective agreement because the construction work performed at that site fell within the collective agreement and was not being performed in accordance with the terms of that collective agreement.

That grievance was referred to arbitration before this Board (OLRB File 2367-87-G) and was ultimately adjourned *sine die* on December 4, 1987. This application was filed on January 5, 1988. For purposes of this application the parties have agreed that the "type" of work performed at the Elmbrook Park Library site is the "type" or "kind" of work encompassed in the collective agreement. The parties have not agreed that the work performed at the Elmbrook Park Library was in fact covered by the collective agreement, or was performed in violation of that collective agreement. The resolution of that issue ultimately will have to be determined by the panel of the Board which hears the grievance.

5. The City is a municipal corporation. It carries on the business of a municipal corporation and provides a wide variety of municipal services to residents of the City as permitted or required by the *Municipal Act* S.O. 1980, c. 302 as amended and various other statutes.

6. The Library Board is also a creature of statute. It was established by By-Law of the Municipal Council of The Corporation of the Township of Etobicoke dated January 10, 1950 (By-Law 7844). That By-Law was passed pursuant to predecessor legislation to the current *Public Libraries Act* 1984, S.O. 1984, c. 57 as amended ("*Public Libraries Act*"). After the creation of the Borough of Etobicoke, by By-Law dated January 4, 1967, the public libraries established by By-Law No. 7844 were continued as public libraries of the Borough of Etobicoke and were placed "under the management, regulation and control of the Etobicoke Public Library Board." In accordance with the statutory requirements found in section 3 of the *Public Libraries Act*, the current Library Board is a corporation known as The Corporation of the City of Etobicoke Public Library Board. Subsection 3 of that section of the *Public Libraries Act* states:

(3) A public library shall be under the management and control of a board, which is a corporation known as "The (insert name of municipality) Public Library Board".

7. The Library Board is composed of nine members. Pursuant to section 9(3) of the *Public Libraries Act*, each of those members is appointed by the Municipal Council of the City ("City Council"). Of the nine members so appointed, two are appointed on the recommendation of the Board of Education, while one is appointed on the recommendation of the separate School Board. The *Public Libraries Act* dictates that a majority of the members of the Library Board cannot also be members of the City Council. Section 10(2) of the *Public Libraries Act* states:

(2) The appointing council shall not appoint more of its own members to a board than the number that is,

- (a) in the case of a public Library Board or union board, one less than a majority of the board.

In the present case, four of the nine members of the Library Board are also members of the City Council. There is no distinction in the roles played between members of the Library Board who are also members of the City Council and the other members of the Library Board. In making appointments to the Library Board, the City Council both advertises for and interviews prospective Board members.

8. The functions of the Library Board are set out in section 20 of the *Public Libraries Act* as follows:

20. A board,

- (a) shall seek to provide, in co-operation with other boards, a comprehensive and efficient public library service that reflects the community's unique needs;

- (b) shall seek to provide library services in the French language, where appropriate;
- (c) shall operate one or more libraries and ensure that they are conducted in accordance with this Act and the regulations;
- (d) may operate special services in connection with a library as it considers necessary;
- (e) shall fix the times and places for board meetings and the mode of calling and conducting them, and ensure that full and correct minutes are kept;
- (f) shall make an annual report to the Minister and make any other reports required by this Act and the regulations or requested by the Minister from time to time;
- (g) shall make provision for insuring the board's real and personal property;
- (h) shall take proper security for the treasurer; and
- (i) may appoint such committees as it considers expedient.

Apart from the Elmbrook Park Library, the Library Board operates ten libraries and a bookmobile service for shut-ins. Apart from the Elmbrook Park Library, the Library Board owns or leases both the land and buildings required to operate each of these ten libraries. In the case of the Elmbrook Park Library, the land is owned by the City.

9. In order to carry out its function, the Library Board has enacted certain by-laws for the regulation of its business. These indicate that the Library Board has its own corporate seal, its own offices (separate and distinct from the facilities of the City), carries on its own regular and special meetings to carry out its business, has developed rules and regulations in respect of those meetings, elects its own officers, establishes its own committees and task forces, operates its own bank account, and appoints its own Chief Executive Officer and Secretary/Treasurer.

10. The administrative or organizational structure of the Library Board is operated in a manner different and distinct from the administration and organizational structure of the City. The Library Board has its own Personnel Department which carries out all of the personnel functions of the Library Board including the recruitment and hiring of personnel, and the development and general administration of the personnel policies of the Library Board. The personnel policies of the Library Board, including the working conditions, salaries and benefits of employees are approved by the Library Board before implementation. These are distinct from the personnel policies of the City and do not necessarily mirror the policies of the City. For example, the contracts of insurance in respect of employee benefits are entered into by the Library Board and provide for benefits that are different from those provided to the employees of the City. The Library Board is not party to any collective agreement. The employees of the City on the other hand are unionized and are covered by a collective agreement between C.U.P.E. and the City. Employees at the Library Board are members of two staff associations. The Chief Executive Officer of the Library Board meets regularly with each of these two associations to discuss matters relating to terms and conditions of employment.

11. The Library Board also has its own Business Administration Department. This department performs all the accounting functions of the Library Board including its payroll, accounts payable and purchasing. The department is responsible, *inter alia*, for preparing the operating and capital budgets for the Library Board, preparing its monthly financial statements, and preparation of the annual financial report for the Board's auditors. The auditors of the Library Board are also

the auditors for the City. This result is mandated by the provisions of the *Public Libraries Act* and of the *Municipal Act*. Save for the common auditors, the day-to-day financial affairs of the Library Board are handled in a manner separate and distinct from the financial affairs and operations of the City. The Board has its own payroll, issues paycheques in its own name, and makes its own remittances to the Receiver General. There is no interchange of employees between the Library Board and the City.

12. The Library Board has its own Purchasing Department which is responsible for the purchasing of all goods and services. The Library Board purchases certain services such as janitorial, landscape, snow removal and security services from outside contractors. It does not purchase any of these services from, or in co-operation with the City. It does not own any equipment or supplies in co-operation with the City. It does not lease any equipment or supplies from the City. The Library Board also operates its own Physical Facilities Department which is responsible for the maintenance for all library property and buildings. The Library Board has its own Publicity and Technical Services Department, has its own computers and operates its own computer programs. The letterhead, colours and logos of the Library Board are different from those of the City.

13. By reason of section 15 of the *Public Libraries Act*, the Library Board has appointed a Chief Executive Officer who has "general supervision over and direction of the operations of the public library and its staff." Section 15 of the *Public Libraries Act* states:

15.-(1) A board may appoint and remove such officers and servants as it considers necessary, determine the terms of their employment, fix their remuneration and prescribe their duties.

(2) A board shall appoint a Chief Executive Officer who shall have general supervision over and direction of the operations of the public library and its staff, shall attend all board meetings and shall have the other powers and duties that the board assigns to him or her from time to time.

(3) A board shall appoint a secretary who shall,

- (a) conduct the board's official correspondence; and
- (b) keep minutes of every meeting of the board.

(4) A board shall appoint a Treasurer who shall,

- (a) receive and account for all the board's money;
- (b) open an account or accounts in the name of the board in a chartered bank, trust company or credit union approved by the board;
- (c) deposit all money received on the board's behalf to the credit of that account or accounts; and
- (d) disburse the money as the board directs.

(5) The same person may be both the secretary and the treasurer, and the Chief Executive Officer appointed under subsection (2) may be the secretary and may be the treasurer.

The Library Board's own by-laws outline the duties and responsibilities of the Chief Executive Officer, Treasurer and Secretary in a manner similar to, and consistent with these statutory provisions.

14. In the present instance, Mrs. Hall holds all these positions and has done so for nearly a decade. Mrs. Hall obtained this position after responding to an advertisement in the newspaper and attending several interviews. The advertisement had been placed by the Library Board. Mrs.

Hall made application to the Library Board, was interviewed by members of the Library Board (who were not then members of City Council) and was subsequently notified by the Library Board that she was the successful candidate. Mrs. Hall's appointment was not placed before, or otherwise approved by City Council although her salary did have to be approved by City Council.

15. Based primarily on the totality of this evidence, counsel on behalf of the Library Board and the City asserted that there is no functional relationship in the day-to-day administration or affairs of the Library Board and the City. It was their submission that, in terms of the primary or principal function of the Library Board, namely the delivery of a "comprehensive and efficient public library service that reflects the community's unique needs", the Library Board was a corporate entity that, in its day-to-day operations, was functionally independent from the City. The thrust of the submissions made on behalf of the City and the Library Board was to the effect that, in respect of the construction of the Elmbrook Park Library, there was no greater functional relationship between the City and the Library Board than there existed in any other aspect of the Library Board's operation. As a result, it was argued that a common employer declaration ought not to be made in the circumstances of this case.

16. Counsel for the applicant disputed that characterization of the facts. The primary focus and thrust of the applicant's case was that in general terms the City and the Library Board were functionally and economically inter-related and integrated. More specifically however, in respect of the construction of the Elmbrook Park Library this functional and economic inter-relationship was so extensive that, in order to preserve the bargaining rights which have been acquired by the applicant, a section 1(4) declaration ought to be made by this Board. The applicant's counsel placed particular emphasis on the economic dependence of the Library Board upon the City both in terms of the Library Board's day-to-day operations, and in respect of the construction of the new library facility at Elmbrook Park.

17. The evidence and submissions of the parties in respect of the economic relationship between the City and the Library Board, both in general terms and in respect of the construction of the Elmbrook Park Library, were extensive and, in view of the respective positions of the parties, require particular attention. That evidence and those submissions must be examined in the context of the statutory framework in which the City and the Library Board exist, namely the *Public Libraries Act* and the *Municipal Act*.

18. The relevant provisions of the *Public Libraries Act* are as follows. Pursuant to section 19 the Library Board may, with the consent of the City Council acquire real property.

19.-(1) A board may, with the consent of the appointing council or, where it is a union board, the consent of a majority of the councils of the municipalities for which it was established,

- (a) acquire land required for its purposes by purchase, lease, expropriation or otherwise;
- (b) erect, add to or alter buildings;
- (c) acquire or erect a building larger than is required for library purposes, and lease any surplus part of the building; and
- (d) sell, lease or otherwise dispose of any land or building that is no longer required for the board's purposes.

19. Section 24 imposes upon the Library Board an obligation to submit to the City Council an annual budget. Pursuant to the provisions of that section the budget, (or some portion of it) is approved by the City Council and thereafter the Library Board *must* spend the monies approved

and paid to it by the City Council in accordance with the budget submitted and approved. The Library Board may only spend the money paid to it in a manner different than the budget with the approval of the City Council. (See also section 71(17) of the *Municipal Act* R.S.O. 1980 chapter 302 as amended).

Pursuant to section 24(7), the annual financial statements of the Library Board must be submitted to City Council and must be audited by an auditor appointed by the City Council under section 88 of the *Municipal Act*. The evidence in this case indicates that although the auditors for the Library Board are appointed by the City Council, those auditors are paid by the Library Board and report to the Library Board.

20. Section 25 of the *Public Libraries Act* authorizes the issuance of Municipal debentures for the purpose "of acquiring land, for building, erecting or altering a building or for acquiring books and other things required for a newly established library." That section states:

25.-(1) Subject to the approval of the Ontario Municipal Board, the sums required by a public Library Board or union board for the purposes of acquiring land, for building, erecting or altering a building or for acquiring books and other things required for a newly established library may, on the application of the board, be raised by the issue of municipal debentures.

(2) The board's application shall be made to the council or councils of the municipality or municipalities for which the board was established.

(3) The council or, if more than one, each of the councils, at the first meeting after receiving the application or as soon thereafter as possible, shall consider and approve or disapprove it, and if a vote in any council results in a tie, the application shall be deemed to be disapproved by the council.

(4) If the council, or a majority of the councils where there are more than one approves the application and the Ontario Municipal Board approves it, the council of the municipality or, if more than one, the council of the municipality that has the greatest population shall raise the sum required by the issue of debentures in the manner provided by the *Municipal Act*, or, if it so desires, the council of any municipality may raise its proportion of the sum required by the issue of its own debentures.

21. In addition to these sections which deal specifically with the economic relationship between the City and the Library Board, the other relevant provisions of the *Public Libraries Act* are as follows: 23(4)(f) which empowers the Library Board to make rules "regulating all other matters connected with the management of the library and library property."; Section 30 which authorizes the Ministry of Citizenship and Culture to make grants to the Library Board "out of legislative appropriations for library purposes,."; Section 42 which empowers the Ministry of Citizenship and Culture to dissolve the Library Board in which case the assets and liabilities of the dissolved Library Board are "vested in and assumed by the Municipality ..." (section 42(3)).

22. In respect of the debentures issued to build the Elmbrook Park Library, we were referred to certain provisions of the *Municipal Act* and the *Municipality of Metropolitan Toronto Act* R.S.O. 1980 chapter 314 as amended. These provisions, and the evidence before us indicate that neither the Library Board nor the City have the requisite authority to raise money through the issuance of municipal debentures. Although the Library Board may request or apply to the Municipality of Metropolitan Toronto, and ultimately to the Ontario Municipal Board, for approval for the issuance of such debentures, the debentures are issued in the name of the Municipality of Metropolitan Toronto. The money so raised or borrowed is "charged back" to the City. In respect of the debentures issued for the construction of the Elmbrook Park Library, the City in turn "charged" its debt charges in respect of the debentures "back" to the budget of the Library Board.

23. The evidence before us indicates that in its day-to-day financial and economic matters, (and leaving aside for the moment the economic or financial aspects relating to the construction of the Elmbrook Park Library) the Library Board operates in a manner consistent with this statutory framework.

24. In excess of 86 percent of the Library Board's operating budget for the 1986 fiscal year came from the City. Approximately 7.5 percent of its revenue that year came from provincial grants, while approximately 4.5 percent was obtained as revenue from such sources as fines, photocopying charges, rental fees, etc. The remaining amount was listed in the budget as "other income". These percentages are typical of the manner in which the Library Board obtains its monies from year to year.

25. In order to acquire the money from the City, for either operating expenses or capital projects, the Library Board must go through a budgetary process. Although we heard much detailed evidence about this budgetary process, for purposes of this application the process may be simplified as follows. Once a year the staff of the Library Board generates its own operating capital budgets. The budget developed by the staff is ultimately placed before, examined and eventually approved by the committee of the whole of the Library Board. After approval by the Library Board, the budgets are submitted to the Treasurer of the City. The budget is then assigned to a controller of the City who, examines and reviews the Library Board's budgets, discusses those budgets with the senior staff of the Library Board, and in particular with Mrs. Hall. That controller ultimately makes recommendations in respect of these budgets to the Budget sub-committee of the Board of Control for the City. This Budget sub-committee then makes its recommendations in respect of the budgets to the Board of Control which, after its examination ultimately makes its recommendations in respect of these budgets to City Council. City Council then either approves or disapproves the budgets of the Library Board which are before it.

26. At the various stages of this budgetary process, the staff of the Library Board, (and particularly Mrs. Hall), have an opportunity to make representations and discuss or debate the budgets and any budgetary concerns with the appropriate individuals. The Library Board need not accept the various recommendations of those city officials who examine the budget and move it along until its ultimate placement before the City Council. A certain amount of lobbying between and amongst the persons involved in the process takes place. That lobbying may include a certain degree of political lobbying. In the end result a number of adjustments, amendments and compromises are made to the budgets initially developed internally by the Library Board before those budgets are ultimately approved by the City Council.

27. Although the budgetary process for both the capital and operating budgets are the same, we note that the budgets do not go through the process simultaneously. We note also that any adjustments to the operating budget made during this process tend to be "bottom-line" only adjustments. Typically, these consist of the Controller, Budget Sub-Committee of the Board of Control, the Board of Control or the City Council itself advising the Library Board that it must reduce its "bottom-line" before the budget will be recommended or approved. The Library Board then makes any appropriate adjustments it feels necessary. Adjustments, changes or amendments to the capital budget on the other hand tend to be much more item specific.

28. On the basis of the facts outlined thus far, counsel for the union submitted that there was common direction and control of the two entities. Counsel asserted that the City had fundamental control in the composition and constitution of the Library Board. The City appoints all members *and* four of the nine Library Board members are also members of the City Council. Moreover, it was asserted, that the City by reason of the various legislative provisions dictates how

the Library Board obtains its funds. Through its involvement with, and control of, the budgetary process the City controls how those funds are spent. The fact that the City does, and by reason of statute *must* approve both the operating and capital budgets of the Library Board, in essence means that the City controls everything including such essential matters as the number of persons employed and the equipment purchased by the Library Board. Put colloquially, the gist of counsel's submissions in this regard was that, as the City pays the piper, it was the City which chooses the music which the piper plays. The City's control of the "purse strings" amounted to "control" within the meaning of section 1(4) of the Act. The substance of counsel's submissions was that the *Public Libraries Act* clearly indicated that the Library Board is, to use counsel's terminology, "crucially and fundamentally" dependent on the City for its creation, composition and how it operates. Counsel pointed to the difference between the Library Board and, for example the Board of Education which is comprised of elected, not appointed members, and whose budget *must* be approved by the City which merely collects the revenue required by the Board of Education through specified local taxes.

29. For their part, counsel on behalf of the Library Board and the City characterized the financial or economic relationship between the City and the Library Board as one compelled by statute. Counsel emphasized that the same statute which mandates this financial relationship also mandates that the management and operations, the "direction or control" (within the meaning of section 1(4) of the Act) of the two entities be separate. Each entity has been recognized by the legislature as a separate corporate entity, managed by its own board (or council). By reason of the legislation, the Library Board does not, and cannot have a majority of its members as members of City Council. Counsel characterized the Library Board as having all of the management control of a person. It was argued that it is the Library Board which "controls" how to spend the money that comes into its possession, subject only to the statutory caveat that, at the beginning of each fiscal year it submits a budget to the City council to indicate how it intends to spend the funds received. Thereafter it spends those funds in compliance with that budget. Counsel describes the various statutory provisions as no more than "safe-guards" or "checks" on public funds with the City, in essence being no more than a "banker". Counsel submitted that the statutory framework must be considered not only in determining whether there is common direction or control of associated or related activities, (which it was submitted there was not) but also when determining whether the Board ought to exercise its discretion and make a common employer declaration in the event we determined that the three preconditions are present in the circumstances of this case.

30. In this regard counsel also referred to an agreed fact amongst the parties that there are a number of municipalities in the Metro area which have collective agreements covering municipal employees and within those same municipalities there are Library Boards which also have separate collective agreements as separate parties and not as part of the municipality. Again we note that although the municipal employees of the City are covered by a collective agreement with C.U.P.E., employees of the Library Board are not unionized. Counsel argued that these circumstances indicate that, in respect of these two respondents and within the labour relations community generally, there has been a recognition that the municipalities and the Library Boards operated within municipalities are separate employers. In essence, counsel argued that this development of separate bargaining structures was the result of the statutory framework which *compels* that the entities be treated as separate employers each subject to the direction and control of its own Board of Directors or Council and its own management structure.

31. We will address the submissions of counsel in respect of that issue, together with their submissions in respect of the law, after we have examined the facts and circumstances surrounding the construction of the Elmbrook Park Library. In our examination of those facts and circumstances we will also set out the submissions of the parties with regard to the "interpretation" of

those facts and circumstances, and the conclusions we ought to reach or the inference which should be made from those facts and circumstances given their surrounding context.

The Elmbrook Park Library

32. Although the evidence discloses that there had been some thought and/or discussion amongst staff and members of the Library Board with regard to establishing a public library in the area west of Highway No. 427 prior to 1983, the starting point for our purposes is 1983. In fact, at least two reports (including a set of planning criteria for branch libraries prepared in April 1981) had been prepared by the library before 1983. In 1983 a report entitled *A proposal for the delivery of Public Library Service in the City of Etobicoke west of Highway No. 427* was approved by the Library Board. As a result, in its capital budget request to the City in 1984, the Library Board included a request for funds to construct a free-standing building of 4,000 square feet on half an acre of property in an area north of Rathburn and west of Highway No. 427. Notwithstanding the approval of that capital expenditure by the sub-committee of the Board of Control and the Board of Control itself, when the matter was placed before the City Council, the money required for the construction of such a library was not approved by the City Council. As a result, the proposed library was not constructed.

33. This was only the first hurdle on the road which ultimately led to the construction of a library in the area west of Highway No. 427. Subsequent events showed that there would be a number of other obstacles to overcome before the library was built. We note that, notwithstanding the City's refusal to allocate funds, by motion 84-165 of the Library Board, the Library Board determined:

... THAT capital funding for the Neighbourhood Branch, Centennial Park Area, (West of Highway #427/South of Highway #401), as deleted by Council in 1984, be requested in 1985 at an appropriate designated amount to be determined.

From this we can infer that, although the City Council had not approved the funds in 1984, the Library Board intended to ask for the money again in 1985. The concept or idea of a library in the area West Highway No. 427 was therefore not, as least from the perspective at the Library Board, a dead issue. Indeed, on May 8, 1985 a group of citizens from the Eringate area appeared before the Library Board requesting library service in their area.

34. On July 31, 1985 the City clerk wrote a letter to the Director of the Library Board. His letter enclosed a letter from a resident "requesting the establishment of the public library in the Eringate subdivision". In his letter, the City clerk advises the Director that:

This letter was before Council, at its meeting held on July 29th, and was referred to you for a report to the Board of Control. In this regard, Council would like to know the status of the matter, and any detail information you can provide.

- What research has been done by the Board to date.?
- Are you pursuing the use of vacant schools, stores, etc.?
- What alternatives have been investigated.?
- What are the costs involved.?

As a result, the Library Board prepared for the Board of Control a report dated August 16, 1985.

35. Counsel for the Bricklayers submits that these circumstances disclose the involvement

of the City at the very beginning of the process which ultimately resulted in the building of the library in Elmbrook Park. Counsel argues that the Elmbrook Park Library was not initiated by the Library Board, but rather came about because the City as a result of a citizen's complaint, "resuscitated" or "breathed life" into a project which it had previously turned down. In support, counsel points to the contents of the letter from the City clerk which in effect says "what are you doing about this". He argues that it is significant that the letter from the City clerk does not merely say "we will now agree a library is needed in the area, here is the necessary funding." Equally significant, counsel suggests, is the response of the Library Board to this request. The Library Board does not in its report to the Board of Control respond that it *will* build the library, (as it had originally suggested in its request for capital funding to the City in 1984) and request the necessary funds. Rather, the Library Board in its report to the Board of Control merely specifies what steps have been taken to date, outlines the alternatives which have been investigated and the cost associated with those alternatives.

36. For their part, counsel for the respondents argue that this set of facts and circumstances indicate that the concept or idea of the library in the area west of Highway No. 427 originated with the Library Board. It was submitted that the Library Board identified the need for a library in this geographic area, and otherwise laid the ground work and prepared the background material which eventually led to the establishment of a library in this area. Counsel disputes the characterization that the City breathed life into a project which it had previously derailed. It is argued instead that the proper interpretation is that the Library Board, having had an earlier set-back when the City failed to approve the capital expenditure, seized upon a fresh opportunity to push its ideas. Viewed from this perspective, it was argued that if the Library Board did not itself wish to build a library in that area, or if it did not see a need for further library services, the Library Board would merely have responded that it would not build the library. Pursuant to statute, it is the Library Board which is ultimately responsible for providing library services.

37. The report of the Library Board dated August 16, 1985 was considered by the Board of Control at its meeting on August 21, 1985. In its report the Library Board identified six alternatives and provided to the Board of Control the capital costs and operation costs for each of these alternatives. The alternatives range from the construction of a free-standing building on land to be purchased, to the erection of portable structures on a serviced location yet to be acquired. The Library Board concludes the report by stating:

With respect to its Capital Programme for 1986, the Library Board will be giving serious consideration to the two alternatives which will best meet the needs of local residents:

- . Alternative 1. Free standing building on land to be purchased
- . Alternative 2. Lease space in a mall or plaza

38. After receipt and consideration of the report, the Board of Control "requested the Library Board to obtain more specific information with regard to provincial grants applicable to library services. When this additional information has been received by the City, a special meeting of the Budget sub-committee will be convened to consider the Library Board's request for a library facility west of Highway 427."

39. Thereafter, at a special meeting at the Library Board held on September 4, 1985, the Library Board determined that it favoured the alternative by which the Library Board would lease space in a plaza or mall for the operation of a library in the area west of Highway No. 427. By letter dated September 5, 1985, the Library Board conveyed to the Secretary of the Board of Control information regarding the availability of provincial grants together with the information that the Library Board "favours Alternative 2 (lease space in a plaza or mall)." That letter concludes with

an indication that "the Library Board would appreciate a meeting of the Budget sub-committee as soon as possible and hopes that favourable consideration will be given to this request."

40. A special meeting of the Budget sub-committee was held on September 25, 1985. At the conclusion of their deliberations the Budget Sub-Committee made the following *recommendations*:

- (1) That the City Treasurer determine the financial implications of a 20 year lease on rental property as opposed to constructing a new building.
- (2) That the Director of Industrial Development and the Commissioner of Parks and Recreation Services determine if there is any vacant City property west of Highway 427 which would be suitable for a library.
- (3) That the City Treasurer and the Library Board review the reserve accounts of the Library Board to ascertain if any funds could be made available for the lease/construction of a building for library purposes.
- (4) That the information requested in (1) to (3) and any other information staff may feel is pertinent, be referred to the 1986 Budget Sub-Committee for consideration during its review of Capital requirements for 1986.

These recommendations were subsequently approved by the Board of Control and thereafter by the City Council at its meeting on October 9, 1985. When cross-examined in respect of these circumstances, and in particular when asked why these recommendations concerning the exploration of other alternatives was necessary in view of the fact that the Library Board had already indicated its preference for locating the library in leased space in a mall or plaza, Mrs. Hall responded "I think it's the natural inclination of the sub-committee to explore all alternatives. They weren't satisfied that all alternatives have been pursued. They were particularly concerned with [Alternative] No. 1 [freestanding building]... The long-term implications of Alternative No. 1."

41. Notwithstanding the Library Board's initial preference to locate the library in leased space in a shopping plaza or mall, the library was eventually built as a freestanding structure on park land owned by the City. When asked how that change came about Mrs. Hall indicated that the Library Board began to have second thoughts about the library being located in leased space in a plaza. The plaza in which the Library Board intended to locate the library is across the road from the park where the library was eventually built. The Library Board intended to locate the library in a small addition put on that plaza. Mrs. Hall indicated that when the Library Board had the opportunity to view the plans and drawings for the plaza, the site became less desirable because of certain parking and traffic problems. The Library Board's realization that perhaps the plaza location would not be suitable came at approximately the same time during which City Council requested the City Treasurer to examine the long-term financial implications of the lease versus ownership proposal. The Library Board also considered this data and determined that a freestanding structure located on City property would be preferable. This evidence was not contradicted or challenged. There was evidence to suggest that the Library Board initially favoured the lease option because it was the one which the Library Board perceived as being the option which would be most acceptable to City Council in view of its earlier rejection of the freestanding building. On cross-examination Mrs. Hall did indicate that the City Treasurer had advised her that "it might be appropriate to drop the leasing alternative and in all probability it wouldn't fly." She further testified that the Library Board was more concerned about making sure that approval for the library was granted so that a library was operated in the area. It was less concerned with whether the library was in leased space in a mall, or a free standing building.

42. Based on these facts and circumstances, the respondents assert that it was the Library Board which determined whether to lease or own the property required for the library. Counsel for

the union on the other hand points to these facts as indicators of the type and amount of control which the Board of Control and City Council exert upon the Library Board and upon the construction of this library facility. Counsel points to the evidence of Mrs. Hall that the Board of Control was "not satisfied all alternatives had been pursued." It was the Board of Control therefore which required further information. Moreover, the Board of Control and the City Council directed that the additional information which it required before determining how it would proceed came from employees of the City and not employees of the Library Board. Thus, for example, the Board of Control and Council directed the City Treasurer, and not the Library Board, to examine the financial implications of a twenty-year lease on rental property as opposed to constructing a new building. Similarly, the City Treasurer was directed, together with the Library Board, to review the Reserve Accounts of the Library Board to determine if any funds could be made available for this library project. The Director of Industrial Development and the Commission of Parks and Recreation, and not the Library Board, were directed to determine if there was any vacant City property west of Highway No. 427 suitable for the library. Counsel asserts that it is only after the City Treasurer advises against the lease option that the Library Board discontinues to favour the option that it had initially preferred. In reply, counsel for the City submitted that the actions of the City in this respect were no more than the exercise of those duties and responsibilities which the City is required to perform as a watch dog of the "public purse".

43. After the City Council meeting, Mrs. Hall discussed with the City Treasurer the availability of funds in the Reserve Accounts of the Library Board. It was agreed that funds for the new library were not available in the Reserve Accounts. In addition, some time in March 1986, Mrs. Hall met with both the Director of Industrial Development and the Commissioner of Parks and Recreation Services to discuss the availability of City owned property. Mrs. Hall and the Director of Industrial Development eliminated all City owned land as being unsuitable. After examining a map of all the parks in the area, Mrs. Hall and members of her staff looked at each of the parks to determine the parks' suitability for a library and, as stated by Mrs. Hall, "... I eventually got back to the Commissioner of Parks that Elmbrook Park was the only suitable park location." The Commissioner agreed with that assessment.

44. Although the Commissioner of Parks agreed that Elmbrook Park was a suitable location for the library, a dispute arose between the Commissioner of Parks and Recreation Services and the Library Board as to where, within the park, the library should be located. For reasons relating to its own planning criteria the Library Board preferred to locate the library in the south-east corner of the park. The Commissioner on the other hand wanted to see the library located in the north-east corner of the park. It required numerous meetings and further reports before that dispute was ultimately resolved. Counsel for the applicant argues that the process by which the south-east corner of the park was eventually determined as a location for the library is instructive to illustrate the type and the degree of control which the City exercises over the Library Board and the ultimate construction of this library. In our view, the exact nature of this dispute or a chronological recitation of the events until the dispute was ultimately resolved is not necessary. Suffice to say that each of the parties marshalled various reports to support or substantiate their position in respect of the optimum location of the library within the park. The Library Board engaged the services of an architectural firm to prepare a report which was then submitted to City Council. That report supported the Library Board's position that the library be located in the south-east corner of Elmbrook Park. Ultimately, on September 2, 1986, the general committee of City Council recommended (in favour of the Library Board's position) that the south-east corner of the park be provided for the library. This recommendation was adopted by the City Council at its meeting on September 8, 1986.

45. Counsel for the respondent asserts that this sequence of events confirm that it was the

Library Board which identified the criteria for this site and selected the site on which the library was constructed. Counsel for the applicant on the other hand submits that the sequence of events disclose little more than a “power play” with the City making the ultimate decision as to where the library should be located. Counsel characterized the report from the architectural firm as a means used by the Library Board to back-up its position and convince City Council. Counsel argues this is yet another example of the City’s pervasive influence. He submitted that if the Library Board were truly autonomous, the numerous meetings and reports would not have been necessary or relevant.

46. Given the statutory provisions, and in particular section 19 of the *Public Libraries Act* which empowers the Library Board to acquire land and erect buildings “with the consent of the appointing Council” it is not surprising that the City ultimately determines (to use a somewhat neutral term) the site upon which the library was built. In addition, because the City owns the land upon which the library is to be built, it is not unusual that the City should have some say as to where, upon *its* property, the building is to be located.

47. Before examining the facts relating to the “construction” aspects of the library including the selection of the architect, the tendering process and the construction contract, we turn briefly to address certain issues which are secondary to the dispute between the parties relating to the construction of the library *in* the Elmbrook Park. These issues include the lease arrangements between the City and the Library Board in respect of the property, certain By-Law exemptions and matters relating to a waiver of the site-control agreement by the City.

48. Once the Elmbrook Park site had been agreed upon as being the optimum location for the library (although the exact location of the library within the park had not yet been determined) the City made application to the Committee of Adjustment for a variance to allow a library facility in the park. There had been some suggestion that there was a need to rezone the park lands to allow for construction of the proposed library. Although the park lands were zoned in such a manner as would normally allow the construction of libraries in the park, a site specific By-Law exempted certain institutions, including schools and libraries from being erected on that site. The same site specific By-Law on the other hand permitted the erection or construction of “public” buildings. The definition of “public” buildings specified “municipal, provincial or federal government buildings, fire halls, parks and playgrounds, community centre.” On July 24, 1986, the Committee of Adjustments determined that a library facility fell within the “public” building exemption and that a zoning variance was therefore not required. Counsel for the applicant argues that it is significant that the City, and not the Library Board makes the application to the Committee of Adjustments. He argues that it is equally significant that the zoning change is not required because the library is a “public” building.

49. The application for site plan approval for the construction of a library facility was made on behalf of the Library Board by the architectural firm which had been engaged by the Library Board. That application for site plan approval was approved by the development committee on January 28, 1987 and adopted by Council (thereby approving the site plan) on February 9, 1987. The approval of the application for site plan’s approval stated, *inter alia*,

THAT an application by the Etobicoke Public Library Board for site plan approval for the construction of a 1-storey library building at the north-west corner of Renforth Drive and Elmbrook Crescent be approved, subject to fulfilment of the following conditions prior to the issuance of a building permit:

1. That the requirement for the signing and registration of a Site Control Agreement be waived.

Counsel for the applicant union addressed the fact that the requirement for the signing and regis-

tration of the site control agreement was waived. A site control agreement is usually required. The site control agreement was described as an agreement between the City and the developer about what is built on the site. In cross-examination, when questioned on this matter, Mr. Gillespie, the City Clerk gave various reasons why the site control agreement was waived. Included in those reasons was the fact that City Council felt the agreement was not necessary in view of the fact that it had already seen the site plan. Mr. Gillespie also stated however, that it was not unusual to waive the site control agreement where the City was dealing with an "affiliated" or "local board". We note that the Library Board is a "local board" within the meaning of the *Municipal Affairs Act*.

50. Counsel for the union submitted that the fact that the City waived the site-control agreement, after receipt of a report by its own Commissioner of Planning, and Mr. Gillespie's answers in cross-examination in respect of this matter are facts which point to the issues of common direction or control and the matter as to whether the respondents are engaged in associated or related activities and the exercise of our discretion.

51. We view as relevant the terms of the construction By-Law passed by the City on May 19, 1987. Mr. Gillespie testified that the construction By-Law is necessary as it authorizes construction upon City owned lands. Such a By-Law is required in all instances where something is to be constructed upon City owned lands notwithstanding the fact that the lands may ultimately be leased by the City to a different entity. Mr. Gillespie further testified that the requirement of a site-control agreement was waived in the circumstances of this case because the City had passed the construction By-Law. The inference we draw from that is that with the construction By-Law in place, a site-control agreement was superfluous. The relevant terms of the construction By-Law are as follows:

THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE CITY OF ETOBICOKE
ENACTS THE FOLLOWING:

1. THAT the construction of a library to serve the area west of Highway 427 be authorized at a total estimated cost of \$771,250.00, of which amount \$408,010.00 is to be debentured, \$205,940.00 is to be paid by subsidies and \$157,300.00 is to be paid by the 1986 Tax levy, Capital from Levy - Library, Account No. 1321-883-0.
2. THAT the subject library be constructed in accordance with plans, profiles and specifications and such information as may be necessary for the making of a contract for the execution of the work.
3. *THAT the work shall be carried on and executed under the superintendence and according to the directions of the Public Library Board of the City of Etobicoke.*
4. *THAT the Public Library Board of the City of Etobicoke be authorized to cause a contract for the construction of the work to be made and entered into with some person or persons, firm or corporation subject to the approval of this Council to be declared by resolution.*

[emphasis added]

52. Mrs. Hall testified that from the perspective of the Library Board the passage of the By-Law was significant because it permitted the Library Board to call for tenders. We will refer to the terms and significance of the construction By-Law when addressing matters relating to the tendering and funding for the construction of the library.

53. At its November 27, 1986 meeting the Library Board passed the following resolution:

That staff be authorized to proceed with the development of the lease for the property at Elm-brook Park, such lease agreement to be submitted to the Board for approval prior to signature.

Thereafter, following certain correspondence between the property agent of the City and the Deputy Director of the Library Board, a lease was ultimately signed on March 13, 1987. That lease is between the City and the Library Board and contains the following provisions:

2. To have and to hold the Lands (including all buildings, fixtures and improvements from time to time upon or appurtenant to the Lands) for and during an indefinite term to be computed from the day of July 1, 1987, and from thenceforth ensuing and continuing until the earlier of:

- a) three (3) years from the date hereof should construction not have been commenced by the Lessee for the erection of a building to be used exclusively as a public library for the general use of the public;
- b) any buildings erected upon the Lands cease to be used as a public library by the Lessee;
- c) the Lessee ceases to exist as a separate and distinct legal entity and consent is not given by the Lessor to the assumption of the terms and provisions of this Lease by the successor of the Lessee, if any,

but subject to prior termination in the events herein set forth.

3. For the purposes of this Lease, the words "public library" shall be defined to mean a building to be used for the purpose of providing library services to the public in accordance with the *Public Libraries Act*, S.O. 1984, c. 57, as amended, and any successors thereto.

4. Upon the expiration of the term or any permitted period of overholding, or if the Lessor shall become entitled to terminate and shall declare this Lease to be terminated pursuant to any provisions hereof, the Lessee shall surrender to the Lessor the possession of the Lands and all of the fixtures and improvements then erected thereon (all of which shall become the property of the Lessor without any claim by or compensation to the Lessee) and all the rights of the Lessee under this lease Agreement shall terminate (but the Lessee shall notwithstanding such termination be liable to the Lessor for any loss or damage suffered by the Lessor by reason of any default of the Lessee).

The lease is rent free, although it does contain specific provisions which oblige the Library Board, in essence, to pay all operating costs of the property including a five million property insurance policy. In addition to paragraph 4, the lease also contains a provision which specifies in effect that in the event of default, the City may, thirty days after giving the Library Board notice of the default, (and if the default or contingency remains) terminate the lease, re-enter the lands and "re-possess and enjoy the lands, the library building and all fixtures and improvements upon the lands."

54. The applicant submits that the facts that the lease is rent free, that the same solicitors acted for both the lessor (the City) and the lessee (the Library Board) without any concern by either party of the possible conflict, point towards the common direction or control of the respondents. In addition, it is argued that this set of circumstances show the two entities to be associated or related in respect of the construction of this library facility. Counsel for the respondents argued that the correspondence between the parties indicated that, in fact, negotiations in respect of the lease did take place before the lease was ultimately executed. It was submitted that those negotiations evidenced the arm's length relationship between the parties. With regard to the matter of the lease being rent free, counsel argued that nothing could be drawn from that fact save that both the City and the Library Board wished to keep the cost of building the library as low as possible. Consistent with that intent was the fact that the library could be built on vacant property already owned by the City without requiring the Library Board to make capital outlays to purchase the land. We note that as a matter of real property law, at the expiration or termination of the lease,

the City, as owner of the land becomes owner of the fixtures and improvements then erected on the land. In this sense, the City is the "ultimate owner" of the library.

55. We now turn to examine those circumstances which relate to such pre-construction matters as the selection and engagement of the architect and the tendering of the construction contract, and the letting of the contract to a general contractor. It was submitted by counsel for the applicant union, and disputed by the respondents, that intertwined with those matters, is the issue relating to the funding of the construction of the library. We will examine these matters within the context of the funding and budgetary process which occurred.

56. On or about October 23, 1985, the Library Board submitted its capital budget. In that budget the Library Board states:

The Etobicoke Public Library Board is requesting capital funds in 1986 to provide neighbourhood branch services to the northern sector of the area west to Highway No. 427.

The Library Board does not however indicate the amount of capital funds which it requires but rather provides to the Budget sub-committee the "total capital request" which it requires if the library is to be located in leased space in a plaza (\$482,450.00) or if a new, free-standing building were to be constructed (\$722,607.00). When the Library Board submitted its capital budget it had not yet been conclusively determined by either the Library Board or the City which of the two options was preferable. Indeed, the capital budget is submitted after the council meeting of October 9, 1985 at which certain recommendations of the Board of Control were approved (see paragraph 40 herein). As a result the capital budget request makes specific reference to those recommendations.

57. In the capital budget the Library Board states that:

The Board has sought professional advice with respect to the costing of the various alternatives. These suggest that the free-standing building may be the more economical option over the long term. The Board, however, looks forward to receiving the report of the City Treasurer on the financing implications of the various options.

As indicated in paragraph 43 herein, at this stage of the process the Library Board was not greatly concerned with whether the library was located in a free-standing building or in leased space in a mall. The Library Board's primary concern was to ensure that the library was approved for the area which the Library Board had identified, in general terms, as the optimum area west of Highway No. 427. As a result, the Library Board was prepared to await the report of the City Treasurer and let the City decide whether the library should be located in leased space or not. Subsequent to the submissions of the capital budget, the Library Board did provide to the Board of Control further information, including the proposed costs of locating the library in surplus space in a school. This alternative was not favoured by the Library Board.

58. At its meeting of February 5, 1986, the Board of Control recommended:

That the 1986 Capital Budget of the Etobicoke Public Library in the amount of \$838,340.00, as recommended by the Budget Sub-Committee, be approved.

This recommendation was adopted without amendment by City Council at its meeting on February 10, 1986. It was in the period between October 25, 1985 (when the capital budget was submitted) and February 10, 1986 (when the capital budget was ultimately approved) that Mrs. Hall and the staff of the Library Board met with various City Officials to explore the various options relating to the location of the library. As is evidenced by a report from Mrs. Hall to the Library Board dated March 27, 1986, when the City approved the capital amount of \$838,340.00 "it was understood that

the library would be located in Elmbrook Park. However, the details of this specific location in the park and ownership of the land remained to be determined.”

59. A review of the evidence also discloses that in approving the capital amount, the City also approved what portion of that amount was to be raised by way of debentures. As indicated in paragraph 24, neither the Library Board nor the City has the requisite statutory authority to raise money for the issuance of municipal debentures. In the present circumstances, only the Regional Municipality of Metropolitan Toronto can issue debentures. The issuance of municipal debentures is subject to Ontario Municipal Board approval.

60. By By-Law dated February 10, 1986, City Council authorized the City clerk to “make application to the Municipality of Metropolitan Toronto and the Ontario Municipal Board for approval of these expenditures which are to be debentured.” Included in the \$8,014,010.00 amount total of “these expenditures” was the amount of \$408,010.00 representing that portion of the capital budget of the library which was to be debentured.

61. By Ontario Municipal Board order dated May 7, 1986, the Ontario Municipal Board granted an order approving:

- (a) The construction of a Neighbourhood Library Branch West on Renforth Drive, Registered Plan M-1861, Bloc A at an estimated cost of \$771,250.00, and
- (b) the borrowing of money by way of temporary advances not exceeding in the aggregate such estimated costs pending the sale of debentures, and the issuance of debentures therefor to provide the sum of \$408,010.00 by the Municipality of Metropolitan Toronto, chargeable to the applicant corporation.

The “applicant corporation” was the corporation of the City of Etobicoke. The Ontario Municipal Board further ordered “that [the] application be granted and the applicant may proceed with the said undertaking and may pass all requisite by-laws, and the Municipality of Metropolitan Toronto may borrow the money therefor, and may issue debentures therefor in an amount sufficient to provide a sum not exceeding the lesser of the sum of \$408,010.00 or the net cost of such undertaking to the applicant, for a term not to exceed ten years.”

62. Until the Library Board received approval for its capital budget, it could not go ahead with the project and engage the services of an architect. Once the capital funds were approved, the staff of the Library Board submitted a report dated March 20, 1986 entitled, “Criteria for the selection of an Architect”. That list of criteria was then approved by the Library Board. We note that two of the criteria make specific reference to the interaction which the architect will have with the Library Board:

- (3) Ability to work with Library staff and a Board (i.e. a management style acceptable to the Etobicoke Public Library Board).
- (10) Terms of payment acceptable to the Etobicoke Public Library Board.

There are no criteria which make reference to any interaction which the architect will have with the City.

63. After the selection criteria had been approved the staff of the Library Board developed and subsequently sent to twenty architectural firms a request for proposal. That request for proposal included a service proposal which had been approved by the Library Board. These requests were sent out in May with a deadline for response of June 6, 1986. From there a “short list” of the architectural firms which had submitted a bid was evaluated by staff of the Library Board and pre-

sented to the Library Board in a report dated June 26, 1986. Thereafter, the Project Committee of the Library Board visited a number of sites which had been designed by these "short-listed" architectural firms. The Library Board subsequently conducted interviews with each of the short-listed firms and, at a special meeting held on July 10, 1986, the Library Board ultimately selected the firm of Moffet & Duncan, Architects ("Moffet & Duncan"). On August 14, 1986, the Library Board entered into a contract with the architectural firm. There is no evidence that the City was in any way involved in the development of the criteria used to select the architect, the development of the service proposal provided to the architects, the development of the original list and subsequent short-list of architects invited to bid on the project, the interviewing of those architects or the selection of the successful firm. The only caveat to that is that Mrs. Hall did speak to the Commissioner of Parks and Recreation to solicit his opinion about certain work which Moffet & Duncan had performed for the City. She received a positive and satisfactory response. Mrs. Hall indicated, however that this was not a significant factor in the decision to award the contract to Moffet & Duncan.

64. Notwithstanding the apparent absence of involvement by the City, counsel for the Bricklayers pointed to the fact that the contract with the architect was not signed until after City Council, at its meeting on June 27, 1986, passed Resolution No. 288 which stated, *inter alia*

1. That the Etobicoke Public Library Board be requested to appoint, after receiving the advice of the City solicitor, an architect for the design and construction of the library in Elmbrook Park.

Similarly, at the July 10, 1986 meeting at which the Library Board determined to engage Moffet & Duncan, the Library Board itself passed a resolution which stated *inter alia*:

86-119 With respect to architectural services for the construction of a branch library west of Highway #427,

- (1) THAT the architectural firm of Moffet & Duncan be informed that they are the successful candidate;
- (2) THAT the award of the contract be contingent upon receipt of approval of grant funding from the Ministry of Citizenship and Culture;
- (3) THAT, subsequent to the receipt of approval of grant funding and with the advice of the City solicitor, staff be authorized to negotiate the most advantageous contract possible for the Etobicoke Public Library Board;
- (4) THAT, as the successful candidate, and in accordance with the City of Etobicoke Council Resolution #288 approving with amendment Clause 132 of the Thirteenth Report of the General Committee, Moffet & Duncan be requested to immediately prepare a site study report indicating the optimum location within Elmbrook Park for the new library;
- (5) THAT should the approval of grant funding not be forthcoming, payment to the firm of Moffet & Duncan for the completed site study report will be made from the Reserves Account #995 - Consulting Fees.

65. Counsel for the applicant argued that the Library Board did not enter into the contract with the architect until after Council Resolution No. 288 and after the City solicitor had given advice. This, he argued, was another example of the type of control which the City exercised over the construction project. In our view, his submissions in this respect are contrary to the direct and uncontradicted evidence of Mrs. Hall that the Library Board could have and would have (and in the past in fact had) engaged the services of architectural firms without any similar resolution of Council. It is also contrary to the direct evidence of Mrs. Hall that the City solicitor offered no

advice to the Library Board regarding the selection of the architect, but merely reviewed the contract which the Library Board was to enter into with the architect once the Library Board indicated it was prepared to sign that contract.

66. The Library Board's contract with the architect is significant however, for a number of other reasons. Chief amongst those reasons is that it sets out the architect's services and clients (the Library Board's) responsibilities in respect of the design and construction of the library to be located in Elmbrook Park. Included in the architect's services relating to the "construction" of the Library is the "bidding and negotiation phase" which specifies that the architect will provide services in respect of the "bid received and reviewed", "contract negotiations", and "preparation of contract". The Library Board's responsibilities in respect of this phase are limited to the "bid call". In respect of the administration of the construction contract, (in this case a stipulated price contract subsequently entered into between the Library Board and a general contractor, Lael Construction Co. Ltd.), in addition to certain office functions, the architect is responsible for the following "field functions"; "site meeting, site visits, consultant coordination, contract document interpretation, certificate for payment," and "substantial performance and inspection". The Library on the other hand is responsible for "inspection and testing services." In cross-examination in respect of this matter Mrs. Hall was unable to explain what was meant or included in the Library Board's responsibilities in respect of "inspection and testing". She did testify that, in actual fact, the architect was responsible for the supervision of the work of the contractor and was responsible for ensuring that the materials used in the construction that occurred was what was called for in the contract. She was unable to answer any questions as to whether the inspectors employed by the City of Etobicoke to inspect construction done on behalf of the City, provided similar inspection services to the Library Board. She was not aware as to whether or not the Library Board engaged those City inspectors but stated that she did not direct the inspectors of the City to inspect the construction. Mrs. Hall further testified that after the contract was let to the general contractor, (a matter addressed in some detail below) the City had no further involvement with the project. Finally, the contract with the architect speaks of "negotiations with authorities having jurisdiction" and in this area lists as the client's responsibilities the requirement for "Committee of Adjustments" approval. Although the "client" referred to in the contract is the Library Board, application for approval was made to the Committee of Adjustments by the City.

67. Counsel for the applicant suggests that the fact that the City, and not the client to the contract made application to the Committee of Adjustments, together with Mrs. Halls' lack of knowledge of the various matters that were excluded from the architect's responsibilities were indicative of the fact that it was not the Library Board which was intimately involved in the actual construction of the Elmbrook Park Library. Counsel advised that Mrs. Hall was a librarian and neither she, nor the Library Board were necessarily knowledgeable about matters relating to construction. In particular, he argued that it was inappropriate to rely upon Mrs. Hall's evidence that after the stipulated price contract was signed by the Library Board, the City had no involvement in the construction of the Elmbrook Park Library, when Mrs. Hall was unaware of such basic facts about the contract with the architect as, what was included in the Library Board's and the architect's responsibilities, and who, on behalf of the Library Board, was responsible for the matters listed as client's responsibilities such as the "Inspection and Testing Services".

68. In response, counsel for the respondents argued that the onus was on the applicant, that the contract with the architect merely lists the respective responsibilities of the architect and the client and does not go so far to indicate who in fact performed those matters for which each party was responsible. The respondents contend that no adverse inference could or should be taken from the written contract or from the fact that Mrs. Hall, one or two years after the fact, was unable to recall certain specifics relating to the construction of the library.

69. After the contract was entered into, the architectural firm developed a preliminary design and estimated costs for the Library Board. This preliminary design was approved by the Library Board and was not shown to the City. The estimated costs of the preliminary design however were significantly greater than the capital amount approved by the City in February 1986. As a result, in a report dated February 19, 1987, the Library Board considered various options. These options were:

- (a) To "proceed with the tendering phase based on the cost estimate and approach the City for the additional fund required after tender but before the construction contract is awarded",
- (b) Redesign the preliminary design to reduce the costs within the budget,
- (c) Redesign the preliminary design or exclude certain of its components to reduce the costs to a degree and "make application to the City for the balance of the funds required" and
- (d) Redesign the building to bring costs in line with the approved building budget.

70. Some of these options required approval from the Ministry of Citizenship and Culture which had provided certain grant funding for the construction of the library. Rather than request further funding from the City, the Library Board instructed the architect to redesign the building to bring estimated costs in line with the approved building budget. The building was ultimately redesigned and scaled down in size. The estimated costs for the new design were in line with the approved building budget and on July 14, 1987, the Library Board advertised for sealed tenders, on a stipulated sum basis, in the *Daily Commercial News*.

71. The sealed tenders were opened by the Library Board on July 30, 1987. We note that no one for the City was present at the tender opening. With the exception of one tender, each of the tenders submitted was significantly over the costs estimated by the architect and the building budget approved by the City. The one tender which was not, was that of D. M. Architectural Contracting Limited. After the opening of the tenders however Mr. Diego Monaco, the President of D. M. Architectural Contracting Limited called and requested that his bid be withdrawn because a mathematical error (of \$144,000.00) had been made in preparing his bid. This request was confirmed by Mr. Monaco in writing. After receipt of legal advice from its solicitors, and by Resolution 87-154, the Library Board permitted D. M. Architectural Contracting Limited to withdraw its tender. The Library Board's decision to permit the withdrawal of this tender was done without any input from or consultation with the City.

72. In view of the costs overruns (the lowest valid bid being \$192,270.00 over the approved budget) the Library Board considered a number of alternatives. These were to cancel the project, an alternative that was in the view of the Board "... not realistic, since the Library Board is committed to providing service to the area." Another alternative considered was to postpone construction for a year, a proposal which could result in the loss of the provincial grant unless the Ministry of Citizenship and Culture agreed to the deferral. This alternative was not favoured by the architect who stated that in his experience to delay the project was "unlikely to produce lower tenders even if the construction industry enters into a semi-depression period as it did in 1981/1982." Two other alternatives considered were to redesign the building yet again, or to seek additional funds to cover the overrun. Within this latter alternative the Library Board identified as possible the following three options:

- request some funds from council

- have the architect suggest items for cost reductions and re-tender with the three lowest bidders
- find some funds internally.

73. As a result of the cost overruns Mrs. Hall met with the City Treasurer to discuss the possibility of receiving additional funds. The City Treasurer opined that additional funds might be forthcoming because of the time which had elapsed since the date the capital budget for the construction of the library had been approved. His view was that given the extreme rise in construction costs there was a fair chance of success for the Library Board to obtain additional funds. Indeed, when the Library Board subsequently placed a formal request for additional funding before the Board of Control and subsequently the City Council, the City Treasurer wrote a report supporting the Library Board's request.

74. After these discussions with the City Treasurer, the Library Board determined to proceed with the project and request further funds from the City. It approved certain deletions/changes proposed by the architects which provided an estimated saving of \$50,000.00. Thereafter, it directed the architects to prepare revised tender documents to be provided to the original contractors who submitted the three lowest valid bids. These three contractors submitted their post-tender bids on August 31, 1987. The lowest valid bid as a result of the re-tender was a bid which exceeded the approved budget by \$103,260.00.

75. By resolution of the Board, and at a special meeting held on September 10, 1987, the Library Board resolved:

That the construction contract for the Elmbrook Park Library, in the amount of \$516,000.00 be awarded to the lowest valid post-tender bidder - Lael Construction Limited-Contingent upon approval by Council of additional funding in the amount of \$103,260.00.

76. Thereafter the Library Board made its request for additional funding to the Board of Control. It requested that the shortfall of \$103,260.00 be obtained from two sources namely, additional funds from the City and a transfer of funds from the operating budget of the Library. The Library Board wanted and required the approval of the Board of Control and City counsel to transfer \$34,387.00 from its 1987 operating budget to the capital project. It also requested additional funds from City Council in the amount of the remaining \$68,873.00. Further, in its report to the Board of Control, the Library Board notes that it "*is recommending award to the lowest valid bidder (Lael Construction) in the amount of \$516,600.00 contingent upon Council approval of additional funding and of the selected contractor (as required by City By-Law).*" [Emphasis added]. In support of its request the Board attached a report from the architects which indicated the cost overruns were due to inflationary increases and escalating prices brought about by the construction boom. The City Treasurer also wrote a report in support of the Library Board's request stating that he agreed with the method of funding" and recommending that the City approve the request for additional funding. He recommended that these additional funds be taken from an account of the City used for improvement to City owned property.

77. The Board of Control approved the Library Board's request on September 16, 1987 and recommended to the City Council that the additional funds be approved, that approval be given to transfer funds from the operating expenses to the Capital Project and that "in compliance with the By-Law No. 1987-103, the construction contract for the Elmbrook Park Library in the amount of \$516,600.00 be awarded to Lael Construction." Council passed these recommendations on September 21, 1987. On September 22, 1987, the Library Board entered into the standard construction stipulated price contract with Lael Construction Co. Ltd. The price of the contract was

\$516,600.00. Moffet & Duncan Architects are listed as the "consultant". As its consultant, Moffet & Duncan is the Library Board's representative during the actual construction of the library. There is no evidence that the City had any other or further involvement with the construction of the library after it approved the additional funds on September 21, 1987.

78. The respondents submitted that this evidence discloses that the Library Board retained control of all vital and significant matters relating to the actual construction of the library in Elm-brook Park. In addition to choosing the architect, it was the Library Board and not the City which instructed the architect to redesign the library when the original costs estimates were significantly higher than the approved budget. It was the Library Board which called for tenders in the Daily Commercial News. It was the Library Board which determined to permit D. & M. Architectural Contracting Limited to withdraw its tender. When all tenders were over the approved budget, it was the Library Board which considered various options and determined how it would proceed. Thus, the Library Board determined to request additional funding rather than postpone or cancel the project. That option however was determined after Mrs. Hall, had "tested the waters" with the City Treasurer to determine the feasibility of approaching Council for additional funding. It was also the Library Board which decided to revise the tender documents to reduce the costs, and which asked the three lowest bidders to requote based on the post tender addendum. Similarly, it was the Library Board which made the initial determination as to how to accommodate the short-fall in funds. It was the Library Board which selected Lael as a successful contractor, and it was the Library Board which subsequently entered into the stipulated price contract with that contractor. Counsel reiterated once again that any involvement by the City in any of these matters was purely financial and was as mandated by statute.

79. Counsel for the union on the other hand submitted that the Library Board did not have effective control in respect of the essential matters relating to the construction of the Library. Counsel submitted that Mrs. Hall approached the City Treasurer because the Library Board knew it could not proceed with the project until it had received additional funds from the City. It was only after receiving the City Treasurer's assurances and support that the Library Board decided to request additional funds. As an added measure the Library Board submitted a report of its own architect to convince the City that the additional funds were required. Counsel pointed to the fact that by reason of paragraph 4 of the By-Law referred to in paragraph 52 herein, the general contractor *had* to be approved by the City before the Library Board could enter into the stipulated price contract. This fact is referred to in several of the Library Board's own exhibits. Similarly, when Council approved the extra funds, it approved only sufficient funds to permit the Library Board to enter into a contract with Lael. Thus, in approving the extra funds, Council was in effect approving the contract being awarded to Lael. Finally, it was argued that in addition to approving the additional funds (which came from the City Account used for improvements to City property) the City also had to approve the internal transfer funds from one budget of the Library Board to another. Counsel stated that the City's involvement was therefore more than merely writing a cheque, rather, it was a fundamental control of the internal finances of the Library Board.

80. Finally, we note that approximately one third of the capital funds required for the construction of the library came by way of grant from the Provincial Government through its Ministry of Citizenship and Culture. These funds were significant to both the City and the Library Board. As indicated in paragraph 40 herein, the City requested the Library Board to obtain more specific information about available applicable grants before the City would consider the Library Board's request for a library facility west of Highway No. 427. Similarly, when all of the tenders were over the approved budget, the Library Board considered, but rejected, the alternative of postponing the project because of the risk that it would lose its provincial grant. The exhibits indicate that had

construction not commenced prior to March 31, 1988, the approved provincial grant would no longer have been available.

Decision

81. There are three conditions which must exist before a common employer declaration can be made pursuant to the Board's authority under section 1(4) of the Act. These are:

- (a) there must be more than one corporation, firm, individual, association or syndicate involved
- (b) these entities must be engaged in associated or related businesses or activities, whether or not simultaneously; and
- (c) these entities must be under common control or direction.

Even if these three conditions precedent are present, the Board's authority to grant a common employer declaration is discretionary. Notwithstanding the presence of the three conditions precedent, the Board need not make a section 1(4) declaration.

82. We do not propose to outline the thorough and able submissions of law made by each counsel as to whether the three conditions precedent exist in the circumstances of this case. Our decision turns on whether, in the circumstances, we ought to exercise our discretion in favour of making the common employer declaration. Therefore, assuming without finding that there are two entities, engaged in associated or related activities, which were under common direction or control, we turn to address the matter of our discretion.

83. Counsel for the respondents submitted that this was not an appropriate case in which the Board ought to exercise its discretion. In so doing, counsel for the Library Board pointed to the fact of delay which is often cited in cases where the Board has refused to exercise its discretion. She argued that the Library Board has been in existence since January 1950. The union knew, or should have known of its existence and its relationship to the City especially in circumstances where that relationship is set out, at least in part, by statute. Counsel stated that had the union exercised reasonable diligence it should have known, or have become aware of the relationship between the City and the Library Board, and as result would have, or should have joined the Library Board as a respondent at the time of its application for certification.

84. Counsel for the union submitted that there was no reason why the Board ought not to exercise its discretion in favour of granting a common employer declaration. Counsel stated that the purpose of section 1(4) of the Act was not just to protect against the erosion of bargaining rights acquired, but also to protect bargaining unit work that could and would have been encompassed by the collective agreement but for the presence of the separate entity. In support, counsel referred to the decision of the Board in *English & Mould Ltd.*, [1979] OLRB Rep. Feb. 83, *Kustom Insulation Ltd.*, *supra* and *West York Construction Ltd.*, [1978] OLRB Rep. Sept. 879. He argued that, but for this arrangement (the existence of the Library Board) the work would have been covered by the collective agreement which the union has with the City. He characterized the section 1(4) application as no more than an attempt by the union to preserve the bargaining rights it has acquired.

85. Counsel for the respondent City characterized the matter quite differently. He argued that section 1(4) of the Act was strictly "anti-avoidance legislation". It was designed to allow the Board (and parties to applications or complaints before the Board) to identify who the employer is

(and consequently who the employees are) in a certification application or complaint. It is also used to prevent employers from circumventing or avoiding the provisions of the *Labour Relations Act* by merely rearranging the "form" in which the employer carries out its activities. Counsel submitted that section 1(4) was not meant to provide an alternative means by which a trade union becomes certified. It was his position that that was what the union was attempting to do in the present application. He submitted that the applicant was attempting to expand its bargaining rights without going through the normal certification process and that therefore the Board ought not to exercise its discretion in favour of the applicant, but should instead dismiss this application.

86. We find it useful to set out two oft-quoted passages which address both the purpose of section 1(4) and the factors which the Board will consider in the exercise of its discretion. The Board stated in *Industrial Mines Installations Limited* [1972] OLRB Rep. Dec. 1029:

"Section 1(4) is obviously contemplated to cure the mischief [sic] that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al*, [1971] OLRB Rep. 406.

It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted."

87. In *Acto Building (Eastern) Limited*, [1979] OLRB Rep. June 465 at paragraph 15, the Board stated:

15. In the *Industrial-Mine Installations Limited* case, [1972] OLRB Rep. Dec. 1029, the Board referred to the purposes of section 1(4) as being generally to avoid the frustration of bargaining rights which have been acquired by a trade union. In the evolution of the exercise of its discretion under section 1(4) the Board has considered the effects of various equities in a given situation. These equities include a consideration of: (1) whether the applicant is attempting to disturb existing bargaining rights; (ii) whether the applicant is attempting to outflank and avoid an application for certification; (iii) whether there are employees whose interest in selecting their own bargaining agent would be interfered with by the application; (iv) whether the application been made [sic] within a reasonable period of time of the knowledge that the two or more

respondents are closely related and (v) the presence of a scheme to effectively defeat bargaining rights by transferring work from one respondent to another. See the *Elmont Construction Limited* case, [1974] OLRB Rep. June 342; the *Dominion Stores Limited and Min-A-Mart Limited* case, [1978] OLRB Rep. Nov. 1013; the *Harold R. Stark Limited* case, [1978] OLRB Rep. Oct. 945; and the *West York Construction Limited and Bau Canada Limited* case, [1978] OLRB Rep. Sept. 879.

88. The principles and legislative objectives or purposes underlying section 1(4) identified by the Board in these and numerous other decisions may be conveniently summarized as follows: section 1(4) is designed

- (a) to preserve or protect from artificial erosion the bargaining rights of the union,
- (b) to create or preserve viable bargaining structures, and
- (c) to ensure direct dealings between a bargaining agent and the entity with real economic power over the employees.

(See also *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214). These principles and purposes have guided the Board in the exercise of its discretion. In our view, the appropriate question to be asked and answered therefore is whether there are any reasons, consistent with the purposes and legislative objectives underlying the statute to make the common employer declaration.

89. In the present instance, we find that this is not a case in which the Board ought to be concerned that there has been a transfer of work to escape the union's bargaining rights. The structure of the City and the Library Board, and their relationship to each other has not been established or set up to erode the union's bargaining rights and in our view does not have such an effect. Rather this relationship is one dictated by statute. The facts before us are radically different from the, "double breasting" cases in the construction industry where the Board has exercised its discretion and has made the common employer declaration. Unlike many cases in which the section 1(4) declaration has been made, in the present circumstances we are not faced with the situation in which entrepreneurs or employers have chosen the legal vehicles with which to carry out certain of their activities. Rather, we are faced with the situation in which the legislature has established the legal vehicles which these entities must use to carry out their activities.

90. One of the "mischiefs" which section 1(4) was designed to avoid was the artificial erosion of the bargaining rights of the union. Such "mischief" is not present in the circumstances of this case. The union has asserted that in the present instance the Library Board is performing work that could have, would have and should have been encompassed by, and performed pursuant to the collective agreement which the applicant has with the City. By reason of the fact of the Library Board's presence and involvement in this construction project, there has been an "erosion" of the union's bargaining rights. A section 1(4) declaration is therefore necessary to preserve the applicant's bargaining rights. With this we cannot agree. There is no evidence to suggest that the City, at any time, either before or after certification engaged in the construction of library facilities. There is no evidence to suggest that this is work which had traditionally or would normally have been undertaken by the City. Similarly, in view of the fact that the Library Board was first established in 1950, well before the union acquired its bargaining rights, we are unable to conclude that the present circumstances evolved as a result of any scheme by the City to avoid its collective bargaining relationship with the applicant or to erode the applicant's bargaining rights. The present circumstances are not the result of an attempt to have the Library Board construct libraries which the City is obliged to construct, or which the City would normally have constructed.

91. Neither can it be said that the present circumstances raise a concern about viable bargaining structures which can or ought to be addressed through a common employer declaration. Of significance to our assessment in respect of this objective or purpose for granting a common employer declaration, is the fact that there is no evidence before us to suggest that either the Library Board or the City, is or was, the “employer” of the persons at work on this construction project. The evidence before us merely indicates that the Library Board engaged the services of the general contractor to construct the Elmbrook Park Library. In the present circumstances, that factor standing alone is not sufficient to cause us to conclude that the Library Board, and not the contractors engaged for this construction project, was the “employer” of the construction employees who worked on this construction project. Our use of the word “employer” in this instance refers only to the usual and ordinary meaning of the word as a person with the rights and obligations of an employer under the common law of master and servant. Similarly, we do not view the City’s “involvement” in the construction of the Elmbrook Park Library as sufficient to bring it within the parameters of being the “employer” (again in the master/servant sense of the word) of these employees. By reason of statute and the special circumstances relating to these types of municipal activities, the City was a provider of funds. The provision of those funds, in turn, permitted the Library Board to have the Elmbrook Park Library constructed. As neither the Library Board nor the City is the “employer” of the employees engaged upon this construction project, concerns about creating or maintaining viable bargaining structures between the applicant union and the employer of the employees whom it represents do not arise.

92. We wish to emphasize that our determination regarding the “employer” of the employees on this construction project only relates to the issue as to whether, there are any concerns in this case, relating to the creation or preservation of viable bargaining structures which can or should be addressed through a single employer declaration. Our determination in this regard should *not* be interpreted as an indication that this panel of the Board does not concur with those decisions of the Board which clearly state that a person in a construction industry collective bargaining relationship with a trade union may be an “employer” in the sense in which that word is used in the construction industry provisions of the Act, notwithstanding the fact that such person does not directly employ the employees engaged upon a construction project. In respect of that matter we concur with the decision of the Board in *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. March 279 and particularly paragraph 22 of that decision. In the present case, our determination that neither the City nor the Library Board is the “employer” of the employees (in the master/servant sense of the word) goes only toward determining whether there are any concerns about creating or maintaining a viable bargaining structure. In our view a single employer declaration will not address or resolve any problems relating to the viability of the bargaining structure as neither the Library Board nor the City is the “employer (again in the master/servant sense of the word) of the employees working in this construction project. It may be that, although the City is not the “employer” of the employees working on the construction project, its activities or involvement in this construction project nonetheless violate the provisions of the collective agreement to which it is bound. That however is a matter to be determined by the panel of the Board which hears the grievance referred to in paragraph 4. It is not a matter which assists this Board in determining whether, in the present application, a single employer declaration should be granted in order to effect one of the purposes underlying section 1(4), namely to create or preserve a viable bargaining structure.

93. Similarly, no concern about the viability of the bargaining structure arises because two or more entities with separate work forces are carrying on an integrated operation as was the case in *Walters Lithographing Company Limited*. Instead, the operations of the City and the Library Board are not integrated and have remained separate and distinct from each other. In this regard we note that although the parties have agreed that the “municipal employees” of the City are cov-

ered by a collective agreement with C.U.P.E., there is no evidence or suggestion that this collective agreement has ever been applied to the employees of the Library Board. Indeed, the evidence is to the contrary as employees of the Library Board deal with the Library Board through an employee association.

94. Moreover, this operational approach is consistent with the practice of other municipal and Library Board employers and does not seem to offend the sensibilities of that segment of the labour relations community which has, to date, been involved in the organization of employees within this sector. Although invited to do so, counsel were unable to point to any decision in which the Board had previously dealt with an application (either by way of an application under section 1(4) or an application for certification) involving two municipal employers similar to the present respondents. This is a case of first impression as it would appear that historically the labour relations community has treated entities such as these as separate employers. The present applicant followed a similar course when it acquired its bargaining rights in respect of the employees of the City employed in the construction industry. It also did not name or join the Library Board when it applied for certification. Given the special or unique nature of the municipal sector and the fact that the labour relations community itself has recognized that municipal governments, local boards, agencies, etc. are employers which are treated in a manner which is different than employers engaged in typical "commercial" enterprises, we consider it appropriate that in circumstances such as these the Board also recognize, consider and rely upon the special nature of the municipal sector.

95. At this stage and within the context of the first two purposes underlying section 1(4) to which we have referred, we wish specifically to address counsel's submissions that the Board should not exercise its discretion because of delay. (See paragraph 83.) We do not accept counsel's submissions in this regard. In our view, in circumstances such as the present, we would be imposing an unduly onerous duty upon trade unions to seek out and name in its application for certification each and every entity of a multi-entity such as a municipal corporation. Moreover, in the present case there is no evidence to suggest that the union has been wilfully blind or has sat on its rights. There is no evidence to suggest that *since* the certification of the union either the City or the Library Board has engaged in the construction of libraries. On the evidence, this is the first occasion when the applicant could reasonably have asserted its bargaining rights as against the Library Board, and it did so promptly. We do not therefore fault the union for not having joined the Library Board as a common respondent employer when it acquired its bargaining rights. Circumstances which may ultimately lead to a Board declaration under section 1(4) may not exist or be readily discernible at the time the union seeks to be certified.

96. In our view, the issue to be resolved however is that, if there was not a readily apparent reason based on the underlying purposes of section 1(4) to cause the applicant to seek a common employer declaration at the time of certification, what change in circumstances has developed to compel a common employer declaration at this point in time? The union asserts that one significant change in circumstances is that the work of constructing the Elmbrook Park Library is work which is covered by the collective agreement which the union has with the City and is work which, although it should have been performed by the City in a manner which complied with the collective agreement, is now being performed by the Library Board in violation of the collective agreement. If that is indeed the case (and we make no finding as to whether or not the work is covered by the collective agreement or was performed in violation of the collective agreement) that is the subject matter of the grievance and can be dealt with in the arbitration of that grievance. On the other hand, if the work is not covered by the collective agreement and/or was not performed in violation of that collective agreement, then there has not been a change of circumstances which should cause this Board to make a common employer declaration at this point in time.

97. Our analysis and reasoning as it relates to the first two stated purposes or objectives underlying a section 1(4) declaration apply equally when we examine the third purpose of that provision namely the purpose of ensuring direct dealings between the union and the entity which the union asserts has real economic power over the employees. Again, for purposes of this application, it is important to remember that the “employees” directly affected by this application, and therefore the employees over whom the City is alleged to exercise real economic power are bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices.

98. In this instance the applicant has argued that the City has the real economic power and therefore a common employer declaration is warranted. It was argued that, in respect of the construction of the Elmbrook Park Library, the City’s control and involvement in the capital budget meant that ultimately it was the City which decided that there would be a library, that the library would be built as a free standing structure, how much the construction of the library would cost (thereby also approving who would be the contractor) and the manner in which the funds would be acquired, namely the amount to be debentured and the amount transferred from the operating budget of the library. We do not agree with counsel’s characterization of the facts, and find rather that the City’s involvement with the construction project was limited to its financial involvement. In this case, financial involvement, standing alone is not determinative and by itself does not warrant the exercise of our discretion in favour of making the common employer declaration. Generally, in those cases where the Board has granted a common employer declaration because financial “control” existed, inevitably a number of other factors were present as well. Such other factors include an attempt to avoid the bargaining relationship or a significant and direct impact on or interference with matters relating to either the operations or labour relations of the entity. In those instances the Board may issue a section 1(4) declaration to in effect “bring the ghost to the bargaining table”. In this present case however, notwithstanding the financial arrangements which exist between the Library Board and the City such factors are not present. There is no evidence to indicate this arrangement was designed to avoid the bargaining relationship which the City has with the union. Similarly, there is no evidence which points to a *direct* impact on, or interference with matters relating to the overall construction or the labour relations aspects of the construction of the Elmbrook Park Library. Again we note that our determination in this matter relates only to the issue as to whether a common employer declaration should be granted in the circumstances of this case. We make no determination as to whether the activities of the City or its “involvement” in the construction of the Elmbrook Park Library violate the provisions of the collective agreement to which the City is bound. That is a matter to be determined by the Board which hears the grievance if the grievance proceeds to arbitration. We have determined only that the activities or involvement of the City with the affairs of the Library Board or the construction of the Elmbrook Park Library do not warrant the granting of a common employer declaration.

99. On balance and after a review of all the evidence we are satisfied that in the circumstances of this case the City did no more than what it was statutorily obliged to do under the *Public Libraries Act* namely, provide the funds, “consent” to the acquisition of land and the erection of the library (section 19(1)) and “approve” the issuance of debentures (section 25). In carrying out its statutory duties and responsibilities the City did not so involve itself in the construction of the Elmbrook Park Library, as to warrant the making of a common employer declaration. We therefore dismiss the application made pursuant to section 1(4) of the Act. In our view granting a common employer declaration in these circumstances would not be consistent with the purposes or rationale underlying that section of the Act.

DECISION OF BOARD MEMBER D. A. PATTERSON; September 29, 1989

1. I dissent from the majority decision of the Board in Board File 2718-87-R. I believe the

majority decision is wrong in exercising its discretion in not declaring the Corporation of the City of Etobicoke Public Library Board and the Corporation of the City of Etobicoke a related employer under common control or direction pursuant to Section 1(4) of the OLR Act.

2. The facts in this case are not in dispute, it is the conclusions drawn by the majority in respect of those facts which is in dispute. The majority has chosen not to exercise the discretionary power the Board has pursuant to Section 1(4), notwithstanding the fact that they are prepared to assume that the facts and circumstances of this case meet the preconditions to a Section 1(4) declaration.

In my view it is those very same facts which compel the Board to exercise its discretion under the Act and declare the parties a related employer. It is my position in my dissent that there were and are persons in the employ of the City who not only knew they were bound to a collective bargaining agreement with the applicant but had an obligation to any of its configurations within the boundaries of the City of Etobicoke to inform any such configuration or entity that the City was bound to a collective agreement with the applicant especially when an executive decision was made by the City to build any new structure, in this case a free standing Library. The City, I believe, should have informed the Library Board and its CEO Mrs. Hall of this contractual obligation and binding agreement with the Bricklayers Union.

3. The facts on control take a number of configurations which are pertinent to why I came to the conclusion I did.

- (a) The Library Board was brought into existence by virtue of a by-law -- #7844, dated January 10, 1950 -- under the old Municipal Council of the Corporation of the Township of Etobicoke. It was re-passed on January 4, 1967 by the new Borough of Etobicoke pursuant to the Public Libraries Act. By statute, the Library Board became a Corporation: The Corporation of the City of Etobicoke Public Library Board. Prior to any of this the Library was run directly by the City, the services provided today are no different then they were when the City controlled it directly. The Library provides a service to the people of Etobicoke.
- (b) City Council appoints, interviews, advertises for Library Board Members. In fact, four (4) Members of Council sit on the Library Board. I maintain the direct interests of City Council are served by the members appointed.
- (c) Mrs. Nancy Hall, the Library Board's CEO, Secretary and Treasurer, although hired by the Library Board, has her salary approved by City Council. In this respect economic independence for this issue does not rest in the hands of the Library Board.
- (d) The Library Board must submit to the City its annual budget. It must spend the monies approved and paid to it by the City Council. The Library Board staff develop the Board's annual budget, which is put in front of the Committee of the whole of the Library Board. After approval by the Library Board, the budget is submitted to the City Treasurer, who in turn assigns it to a Controller of the City. The Controller recommends to the Budget Subcommittee of the Board of

Control of the City, who in turn recommends to City Council who in turn approves or disapproves the Budget. (see below)

- (e) The Auditors who act on behalf of the Library Board also act on behalf of the City. The pulse of the Library Board is never out of reach of City Council.
- (f) For example in 1986, the Library Board's operating budget, broken down, drew its monies from a number of source:
 - 86.0% from the City
 - 7.5% from Provincial Grants
 - 4.5% from Fines, Rental Fees, Photocopying, etc.
 - 2.0% from other Income
- (g) The Library Board by consent of the City can acquire real property. Currently, the Library Board has 10 other libraries under its control. The City does not own that land. The Elmbrook Library is located on City land.

The monies needed to acquire real property, buildings or erecting buildings is raised by issue of Municipal Debentures.

Mrs. Hall's evidence was that originally the Library Board went to the City with a proposal to build a new library back in 1984, that proposal was turned down. The Library Board was asked by the City Clerk, after a citizen's letter was brought before Council, to prepare a report for Council, an update on facilities to serve in the Eringate Subdivision. The Library Board did send a report back to City Council August 21, 1985, it proposed a number of alternatives to the Board of Control. There were 2 serious alternatives: (1) a free standing building, (2) leased space. The Board of Control then asked the Library Board to further consider funding etc. and came back to the Board of Control with further recommendations.

The Library Board, September 5, 1985, conveyed to the Secretary of the Board of Control that *they*, the Library Board, favoured leased space over new construction. A special meeting of the Budget Subcommittee was held September 25, 1985 and recommendations were made following their meeting.

The Budget Subcommittee of the Board of Control on September 25, 1985, *directly intervened* in the affairs of the Library Board and thereby affected its ability to make the decisions normally made by the Library Board and which City Council had empowered the Library Board to make. The Library Board already owned land where 10 libraries were located. Instead, the City Treasurer was to determine the implications of leased property versus the construction of new property, the Director of Industrial Development and the Commissioner of Parks and Recreation Services were to determine if any vacant *City* property was suitable for a new library building. Also, the City Treasurer was to meet the Library Board to see if

funds were available for the lease/construction of a building for library purposes. These recommendations became directives when approved by Board of Control and City Council October 9, 1985. The City implicated itself by giving direction to the Library Board in this instance. In essence, the City was "calling the shots" from this point forward to the actual construction of the free standing structure. The City made an executive decision to build a free standing structure, the Library Board concurred with that decision.

- (h) The City raised the money for this free standing structure by the issuance of Municipal Debentures. The method employed to raise the necessary funds was to make application to the largest municipality for the debentures, in this case the Municipality of Metropolitan Toronto. Metropolitan Toronto charges the money borrowed back to the City. The City in turn charges the debt charges back to the Budget of the Library Board.
- (i) The lawyers acting on behalf of the City also act on behalf of the Library Board.
- (j) The land on which the Elmbrook Library was to be built is owned by the City. The lease under which the Library functions is rent free. In the event the Library Board Corporation is dissolved by City Council, the City assumed all responsibility for assets and liabilities.

These facts 3(a) to 3(j) collectively, I believe, are strong evidence of the various kinds of control the City exerted over the Library Board. Despite Mrs. Hall's evidence, which I believe to be very credible, regarding the Library's abilities to make decisions in determining the Elmbrook Park Library were made directly by the City or its agents. Once the executive decision on the Elmbrook Library was made and the funding arranged and the site picked out, the remaining responsibilities were given to Mrs. Hall and the Library Board. The City took a more hands-off attitude towards the Elmbrook Library. The City in the final analysis "still pays the bills" and answers to its citizens who requested the Library services.

These facts highlight the reasons as to why the Board should exercise its discretion and grant the Section 1(4) declaration requested by the applicant.

4. In paragraph 89 of the decision, the majority cited *Acto Building (Eastern) Limited* (1979 OLRB Rep. June 465; at paragraph 15, the Board stated:

15. In the *Industrial-Mine Installations Limited* case, [1972] OLRB Rep. Dec. 1029, the Board referred to the purposes of section 1(4) as being generally to avoid the frustration of bargaining rights which have been acquired by a trade union. In the evolution of the exercise of its discretion under section 1(4) the Board has considered the effects of various equities in a given situation. These equities include a consideration of: (i) whether the applicant is attempting to disturb existing bargaining rights; (ii) whether the applicant is attempting to outflank and avoid an application for certification; (iii) whether there are employees whose interest in selecting their own bargaining agent would be interfered with by the application; (iv) whether the application been made [sic] within a reasonable period of time of the knowledge that the two or more respondents are closely related and (v) the presence of a scheme to effectively defeat bargaining rights by transferring work from one respondent to another. See *The Elmont Construction Limited* case, [1974] OLRB Rep. Nov. 1013; the *Harold R. Stark Limited* case, [1978] OLRB Rep. Oct., 945; and the *West York Construction Limited and Bau Canada Limited* case, [1978] OLRB Rep. Sept. 879.

I feel this jurisprudence is directly on the mark as it applies to this case. I feel the actions of the City and the knowledge that its employees and representatives had concerning the contractual obligations the city was bound by, puts the circumstances of this case in line with the policy considerations set out in that case.

I certainly didn't expect Mrs. Hall, the Library Board Council Members and staff of the Library Board to be aware of any contractual obligations the city entered into with any Union especially in the construction trades. At the same time I do not accept the fact that the Treasurer, Controller, Council, Board of Control, lawyers, auditors were not aware of their contractual obligations especially when it comes to building a free standing structure such as the Elmbrook Library.

These guardians of the City's interests are paid, elected and responsible to know what the City's contractual obligations are to whatever Union was certified by the OLRB to have those rights.

5. The second part of this case is the Board's discretion to exercise its discretionary powers under the Act to make the 1(4) declaration. I would have made that declaration. The majority chose not to.

My reasons for making the declaration makes good labour relations sense and fall in line with what I believe the preamble to the Act embodies to foster and promote good industrial relations. I do not believe the Bricklayers application is an attempt to expand their bargaining rights, or force themselves on employees as their bargaining agent, since this was new construction. I believe the Union is attempting to maintain its status for its members. As I wrote above, the Elmbrook Library was new construction, work for which the applicant was certified and held a collective agreement. This type of work is the work the applicant's members were certified to do; this work was denied, with the denial a "lost opportunity" to them. The Board should exercise its discretion to prevent any employer from attempting to avoid its contractual and legal obligations. This case is such an example where the Board should exercise that discretion to protect the bargaining rights the Act bestowed on the applicant.

Exercising that discretion would accomplish exactly what the legislature envisioned when Section 1(4) was passed into law. It puts both parties on a level playing field -- fairly.

6. I maintain the City had ultimate control over the affairs of the Library Board as well as over the project, Elmbrook Library. It had the responsibility to inform Mrs. Hall, the Library Board, of their contractual obligations to the Bricklayers Union, and secondly, to direct the Library Board to build the Elmbrook Library in accordance with those contractual obligations.

The City and/or its employees chose not to do any of the above, thereby eroding the bargaining rights of the Union.

7. In conclusion, I would have found the City and Library Board to be under common control or direction for purposes of the Section 1(4) application by the union and exercised my discretion in making such declaration.

0927-88-M Laundry and Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Goldcrest Furniture Ltd.**, Respondent v. Gerardo Mercante, Vincenzo Reda, Franco Bini and the United Steelworkers of America, Interveners

Evidence - Practice and Procedure - Company bringing non-suit once intervener union had introduced its evidence - Incumbent union concurring in the request to dismiss the application - Whether parties should be put to their election as to whether or not they wish to call evidence - Board discussing non-suit procedure where there are three parties to a proceeding and two bring a non-suit - Parties put to their election

BEFORE: S. A. Tacon, Vice-Chair, and Board Members J. A. Ronson and E. G. Theobald.

APPEARANCES: Bernard Fishbein and Fernando da Silva for the applicant; Stewart Saxe and Anna Lavalatta for the respondent; Brian Shell, Brando Paris and Tom Steers for Gerardo Mercante, Vincenzo Reda, Franco Bini and the United Steelworkers of America, Interveners.

DECISION OF THE BOARD; September 6, 1989

1. Following the interim ruling dated May 31, 1989, the hearing in this reconsideration request was continued. Three witnesses were called by counsel for the interveners, namely, the United Steelworkers of America (USWA) and three named individuals of the bargaining unit, in support of their request for reconsideration of the Board decision granting early termination of the collective agreement between the incumbent trade union (the Teamsters) and the company (Goldcrest).

2. Once the evidence introduced by the interveners was concluded, counsel for the company brought a motion to dismiss the reconsideration application at that point in the proceedings. Counsel for the Teamsters concurred. Those arguments and the submissions of counsel for the USWA are next set out briefly.

3. Counsel for the company submitted that no evidence had been led by the interveners which would warrant continuing with the reconsideration application. Counsel, however, distinguished his motion to dismiss from a non-suit and stated that there was no need in the circumstances for an election as to whether to lead evidence, nor was he prepared to so elect. It was argued the interveners were seeking an extraordinary remedy and had not led sufficient evidence to challenge the material in the file on which the Board had relied in consenting to early termination of the collective agreement. Counsel submitted circumstances in which the Board had indicated in the past that a respondent need not proceed following an applicant's case and dismissed the application were not uncommon and analogous to the situation herein. Finally, counsel contended that it would make labour relations sense not to continue with the proceedings and the concomitant burden on the other parties given the nature of the evidence led by the interveners.

4. Counsel for the Teamsters concurred with the submissions that the reconsideration application be dismissed without the need for an election by the other parties. The evidence led by the interveners was briefly reviewed in support of counsel's assertion that the standard for reconsideration, particularly with respect to "new evidence", had not been met. It was contended that the interveners bore the onus of "ousting" reliance on the materials filed with the Board and on which it had relied and this burden had not been satisfied.

5. Counsel for the interveners disagreed, submitting that the motion was in the nature of a non-suit and the usual procedure was to ask the moving party to elect whether it wished to call evidence. Counsel stressed that the interveners were placed in a difficult position of having to establish a "negative" (i.e., the absence of notice or of adequate notice) and, moreover, it was the integrity of the Board's process in dealing with early termination applications which was at issue given the grounds for the reconsideration. It was argued that the "not need to hear from the other parties" analogy only applied at the "appellate" level, whereas at the "trial" level the non-suit was the appropriate procedure.

6. Notwithstanding the able arguments of counsel for the company and counsel for the Teamsters, the Board considers that the motion brought by the company counsel and adopted by the Teamsters' counsel is properly characterized as analogous to a non-suit motion in civil proceedings. This is not a motion to dismiss on the basis that the interveners have not pleaded a *prima facie* case. The Board, on receipt of the interveners' reconsideration request, directed that the reconsideration be heard and the matter was listed for hearing. Rather, the notice was brought after the close of the interveners' evidentiary case. In the Board's view, the instant situation is indistinguishable from the usual circumstances wherein an opposing party moves for dismissal following the evidentiary case of an applicant/complainant or a respondent in cases where the reverse onus applies. That the instant case deals with a reconsideration request is not significant with respect to the "non-suit" analogy.

7. The Board's usual practice where a non-suit motion is brought is to put the party to its election as to whether or not that party wishes to call evidence. The Board sees no reason to depart from that practice in the instant case. Thus, the Board will put counsel for the company to his election as to whether he intends to call evidence. Given that counsel for the Teamsters, in effect, supported the motion, the Board will put that party to its election as well. If *both* counsel for the company and counsel for the Teamsters elect to call no evidence, the hearing will be reconvened on the dates already set so as to permit all parties to make full submissions as to whether the interveners' request for reconsideration should be granted in the context of the evidence before the Board. If *either* counsel for the company or counsel for the Teamsters elect to call evidence, the Board will reserve its ruling on the preliminary motion pending the conclusion of the evidence and final submissions. In the Board's view, this procedure responds appropriately to the circumstances in the instant case wherein there are three parties to the proceedings and a non-suit motion brought by the company is supported by the Teamsters: see generally *Sun Parlour Greenhouse Growers' Cooperative Limited*, [1971] OLRB Rep. Nov. 743.

8. In order to facilitate the proceedings on October 26, 1989, the date scheduled for continuation, counsel for the company and counsel for the Teamsters are directed to notify the Board of their election decision (and to copy the other parties) not later than October 12, 1989.

9. This matter is referred to the Registrar in accordance with the above.

0419-89-U Guild Electric Limited, Applicant v. International Union of Operating Engineers, Local 793, John Monti, Joseph Kennedy, Mr. Montagnese, Mr. Ricciuto, Respondents v. IBEW Construction Council of Ontario, Intervener

Construction Industry - Damages - Remedies - Strike - Union threatening general contractor with picket line which would cause an unlawful strike - Board finding that threat made but relief not warranted - Request for damages in the context of an illegal strike or lockout application is inappropriate - Board also declining to make declaration because threat was an isolated one

BEFORE: *Ken Petryshen*, Vice-Chair.

DECISION OF THE BOARD; September 6, 1989

1. This is an application filed pursuant to section 135 of the *Labour Relations Act*.
2. This matter came on for hearing in May 1989. The Board reserved its decision and in a written decision dated May 19, 1989 dismissing the application, the Board wrote as follows:
 3. The applicant alleges that on May 4, 1989 a representative of the respondent union, Mr. Monti, threatened a project manager of a general contractor with a picket line which would have had the effect of causing an unlawful strike. On the evidence before it, the Board is satisfied that Mr. Monti made the threat on May 4, 1989 as alleged by the applicant. However, in exercising its discretion in the particular circumstances of this case, the Board finds that the applicant and the intervener are not entitled to the relief they requested in this application. The Board's reasons for its decision will follow in due course.

The Board's reasons for dismissing the application are as follows.

3. In support of its application, the applicant called two witnesses. Mr. A. Jordan is a project manager for The Foundation Company of Canada Limited ("Foundation"). Mr. G. Docherty is the applicant's Operations Manager. In making its findings of fact, the Board considered the testimony of these two witnesses, the documentary evidence and the submissions of the parties relating thereto.
4. The applicant is an electrical contractor that frequently performs groundside road work and related services in Ontario. Most of the applicant's work is obtained by tender from general contractors and is performed in the Toronto, Hamilton and Golden Horseshoe areas. The applicant has approximately 450 employees and performs the work it obtains with its own employees. The applicant is bound to the IBEW'S provincial agreement and to the Provincial Linework Agreement between the Electrical Contractors Association of Ontario and the IBEW Construction Council of Ontario. The applicant does not have a collective bargaining relationship with the respondent, except in Board Area #26.
5. During April and May of 1989, the applicant was engaged in performing certain work at the Pearson International Airport, Terminal 3 project ("airport project") and at the Skydome project. Foundation is a general contractor on the Airport project. The applicant obtained three contracts for work at the airport project that are relevant for our purposes. One contract is with Bot Quebec Limitee ("Bot") and the other two are with Dufferin Construction Company ("Dufferin"). On the Skydome project, the applicant was granted a contract by G. M. Gest Company

("Gest"). Part of the work of these contracts involved the operation of excavating equipment to install electrical conduits. The applicant used its own employees, members of the IBEW, to perform the excavating work.

6. The respondent was not happy with the fact that the applicant's employees are operating the excavating equipment at the projects referred to above. The respondent takes the view that the operation of such equipment is the work of its members. To a certain extent, the evidence suggests that the respondent has mounted a campaign to prevent the applicant's employees from engaging in excavating work on certain projects. Representatives of the respondent objected to the applicant performing the excavating work without its members to the general contractors at the projects with whom the respondent has a collective bargaining relationship. For instance, representatives of the respondent had discussions with a representative of Foundation, a company bound to the respondent's provincial agreement, concerning the excavating work performed by the applicant pursuant to its contract with Bot. In their discussions with general contractors or those contractors who subcontracted work to the applicant, the respondent's representatives strenuously argued that the subcontracting clauses of its provincial agreement were being contravened when other than its members performed excavating work. Given the evidence, it is probable, as suggested by counsel for the applicant, that representatives of the respondent will continue to exert pressure where it is possible for them to do so in order to prevent the applicant from engaging in excavating work with members of the IBEW.

7. It is unnecessary to detail the evidence concerning the nature of the pressure exerted by the respondent and the way in which the problems were resolved with respect to two of the applicant's contracts, namely the Gest Contract at the Skydome project and the Bot contract at the airport project. Suffice it to say that the parties involved in those contracts managed to resolve the problem or agreed to a method for resolving the problem and that there is no evidence to suggest, nor was it argued, that the respondent's conduct in relation to these two situations contravened the Act. The allegation by the applicant of illegal conduct on the part of the respondent arises in connection with the applicant's contracts with Dufferin at the airport project.

8. On May 4, 1989, J. Monti, a representative of the respondent, had a brief, informal meeting with Jordan that had not been pre-arranged. Monti advised Jordan that a jurisdictional problem existed on the site since the applicant had electricians operating excavating equipment. As noted in its decision of May 19, 1989, the Board is satisfied that during this conversation, Monti told Jordan that a picket line would be established if the problem was not resolved. The Board is prepared to assume that the threat to establish a picket line in these circumstances constitutes a threat of an illegal strike. Since Monti wanted Foundation to resolve the problem, Jordan told Monti that he would send a letter to Dufferin. Jordan did send a letter to Dufferin dated May 4, 1989, in which he essentially advised Dufferin of its contractual obligations as well as of the respondent's complaint and directed Dufferin to correct the matter immediately. There is no reference in this letter to Monti's threat to set up a picket line. Subsequent to Monti's discussion with Jordan, Dufferin cancelled the excavation work from the applicant's contracts. Representatives of the respondent had another discussion with Jordan shortly after the first one in which Monti apologized to Jordan for what he had said previously and implied that he did not mean what he said.

9. The Board was asked to find as a fact that Monti's threat to Jordan resulted in the cancellation of the excavating part of the applicant's contracts by Dufferin. Jordan testified that he understood that Monti left him after their first discussion and went to talk to representatives of Dufferin. There is no direct evidence that the respondent's representatives did communicate with Dufferin representatives, let alone what they said to them if they did meet. Apart from his sending the letter, there is no evidence that Jordan discussed Monti's threat with Dufferin. Docherty gave

some hearsay evidence concerning what a Dufferin representative said to him while advising him that the applicant would no longer perform the excavation work. No one from Dufferin was called to give evidence. Although the Board does draw certain inferences in picket line situations, as suggested by counsel for the intervener, the Board is not prepared to draw the inference, based on the evidence before it, that Dufferin acted towards the applicant in the way it did as a result of Monti's threat. Such a casual link cannot be made on the basis of Docherty's hearsay evidence and with the absence of any direct evidence from Dufferin as to why it removed the excavating work from the applicant's contract.

10. Counsel for the respondent argued that the applicant in these circumstances should have applied under section 91 of the *Labour Relations Act* and that the Board should not entertain an application made under section 135 of the Act. Although a dispute over the performance of work may be at the heart of the dispute, an applicant can still proceed with a section 135 application in order to obtain certain relief. This position is well settled in the Board's jurisprudence.

11. The applicant, with the support of the intervener, argued that Monti's threat to set up a picket line in his brief discussion with Jordan on May 4, 1989 constituted a threat of an illegal strike which should be remedied as follows:

- (a) the Board should grant a declaration that the respondent trade union and Monti threatened an unlawful strike;
- (b) the Board should make certain directions against the respondents; and,
- (c) the Board should remain seized with the issue of damages flowing from the illegal threat.

12. A request for damages in the context of a section 92, section 93 or section 135 application is inappropriate. Illegal strikes and lockouts are serious matters that require a quick remedial response. This is reflected by the Act's provisions and the Board's procedures for dealing with such applications expeditiously. The essential feature of these provisions, which is clear from their wording, and the Board's practice, is to address the illegal conduct and bring it to an end. In applications of this type, the Board does not attempt to remedy all of the consequences of the illegal activity. In addition to the wording of these provisions and the manner in which the Board has traditionally exercised its remedial discretion, the presence of section 95, which provides a procedure which a party can utilize to secure damages, is further support for the proposition that, at least as a matter of discretion, the Board should not deal with the issue of damages or reserve with respect to this issue on an application under section 135 of the Act. The Board recognizes that section 95 is not available to a party threatened with an illegal strike and incurring damages as a result thereof. However, section 89 of the Act is available to such a party and it is preferable that that procedural provision be used to secure damages for the reasons set out above. Accordingly, the Board did not find it appropriate to retain jurisdiction to deal with damages as requested by the applicant.

13. The applicant requests a declaration and directions from the Board on the basis of a single threat by Monti to set up a picket line. The applicant argues that it is entitled to this relief since it is likely that the respondent trade union will continue its pressure in an attempt to ensure that the applicant does not perform excavating work with electricians. Although it is likely that the respondent trade union will continue to pressure entities which it has a bargaining relationship with in order to prevent the applicant from engaging in excavating work with the intervener's members, there is nothing illegal about conduct which is motivated by an attempt to enforce collective agreement rights as long as the conduct does not consist of illegal strikes or threats to engage in such

activity. The evidence disclosed that the respondent trade union exerted pressure with respect to two contracts without engaging in illegal activity. Monti's threat to Jordan was an isolated incident. There is no evidence that representatives of the respondent threatened to set up a picket line on any other occasion in connection with work performed by the applicant. Shortly after making the threat, Monti apologized to Jordan. In exercising its discretion to grant relief under section 135 and similar provisions, the Board will most often refuse to give relief once the strike is over. There is no history of illegal strikes or threats to engage in illegal strikes by representatives of the respondent and it appears unlikely that the conduct will be repeated. The Board was satisfied on the evidence that Monti's threat was an isolated one, and that it was unlikely in the circumstances that other threats of a similar nature would be made. It was for these reasons that the Board determined it would not exercise its discretion to grant the requested relief and dismissed the application.

0250-87-R; 0484-87-U United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Mollenhauer Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2; United Brotherhood of Carpenters and Joiners of America, Local 27, Complainant v. Mollenhauer Limited, Respondent

Certification - Construction Industry - Practice and Procedure - Pre-Hearing Vote - Unfair Labour Practice - Applicant union seeking to convert its certification application in which a pre-hearing vote had been requested to one in which no such vote is requested - Board denying request - Unfair labour practice complaint that employer transferred two employees out of bargaining unit to frustrate certification application - Complaint dismissed - Employees in question not permitted to vote - One ballot left to count - Ballot of single employee to be unsealed and counted unless objection received from party

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *P. V. Grasso*.

APPEARANCES: *Douglas J. Wray* and *Tony Bucci* for the applicant/complainant; *Walter Thornton* and *J. A. Whyte* for the respondent; no one appearing for either intervener at the hearings with respect to this stage of the proceedings.

DECISION OF THE BOARD; September 13, 1989

1. The name of the respondent in Board File No. 0484-87-U is amended to "Mollenhauer Limited".
2. Subsequent to the Board's decisions dated December 8, 1988 ([1988] OLRB Rep. Dec. 1254) and March 7, 1989 ([1989] OLRB Rep. March 234), with respect to this and other related proceedings, the applicant sought to convert the application for certification herein from one in which a pre-hearing representation vote had been requested to a "regular" application; that is, one in which no pre-hearing representation vote had been requested. The respondent opposed this request.

3. After hearing the representations of the parties, the Board (orally) denied the applicant's request for the following reasons.

4. The applicant argued that it had originally requested a pre-hearing representation vote because it was aware that there were serious issues which would have to be litigated before the application for certification herein could be disposed of. It was therefore concerned that a vote, if one was necessary, should be taken at the earliest possible time having regard to the often transient nature of employment in the construction industry. The applicant points out that it reserved the right to make the request it was making in the application as filed and submitted that no one would be prejudiced if the request was granted.

5. The respondent argued that the applicant was seeking to change its application after the time it was entitled to do so and that the applicant was doing so in response to the Board's decisions as aforesaid. It submitted that the applicant had a choice to make when it made the application and that it ought not be permitted to now resile from its decision to request a pre-hearing representation vote. It submitted that the applicant could not reserve a right to convert the application as it had purported to do. In that respect, the respondent relied upon Board Practice Note No. 3 and the Board's decision in *Imperial Tobacco Products (Ontario) Limited*, [1972] OLRB Rep. Oct. 868 (application for judicial review dismissed (1973) 3 O.R. 309 Div. Ct.). The respondent also suggested that permitting the conversion requested could prejudice the employees or itself in that either or both might have filed material in support of a request that a representation vote be held had not a pre-hearing representation vote been requested in the application.

6. The Board agreed with the respondent's submissions. Faced with a similar request in *Imperial Tobacco Products (Ontario) Limited*, *supra*, the Board held that:

7. However that may be, the applicant wrongly assumes that the Board will "continue to process this application for certification in the usual way". It is the Board's regular practice to deny an applicant's request to amend an application for a pre-hearing vote (which is made under section 7 of the Act) and convert such application to an application under section 7 of the Act. The different procedures adopted by the Board under section [6] and under section [9] of the Act are mutually exclusive. Once the Board processes such applications and notifies the other parties that the application has been made, the procedures followed are not interchangeable. The Board will not permit leave to amend the application so that the type of application is changed. In this regard see Practice Note No. 3 published in the office consolidation of the Board's Rules of Procedure, Regulations and Practice Notices.

8. The notice of the application given to employees where a pre-hearing representation vote is requested is in Form 6 of the Board's Rules and no invitation is given to the employees to file a statement of objection in such notice, since a representation vote has been requested by the applicant. However, where a pre-hearing representation vote is not requested, notice of the application is given to employees in Form 5 of the Board's rules. Form 5 instructs employees how they may give notice of their opposition to the application. Accordingly, even if the Board were not to take into consideration the rights of the respondent and the intervener and were to grant the applicant's request to amend its application in this matter, a new terminal date would have to be fixed so that notice of the reconstituted application (in Form 5) could be given to employees in order that an opportunity be afforded them to object to the application. If the applicant had made a new application for a certification it could be processed more expeditiously than the applicant's request in this matter since a new application would not require the Board to make and issue a decision concerning a new terminal date since such decision would require the Board to obtain the representations of the other parties prior to the Board making that decision.

7. The Board found that reasoning to be equally apposite to this case. We note that Practice Note No. 3 indicates (as it did in 1972) that, in the absence of some cogent reason to "cancel" the vote, the Board will not grant leave to convert an application for certification in which a pre-

hearing vote has been requested to one in which no such vote is requested unless the request in that respect is received by the Board prior to the giving of notice of the application to other interested persons. In our view, an applicant for certification does have a choice which it must make when it files its application; namely, whether it is or is not seeking a pre-hearing representation vote. That choice is one which must be made, failing which an applicant will be deemed (as the application forms themselves and the Board Practice Note No. 3 indicate) to have chosen to not request a pre-hearing representation vote. An applicant does not have a right to delay making that choice other than as contemplated by Practice Note No. 3 and it is therefore not possible for an applicant to reserve a right (which is non-existent) to do so. Consequently, in the absence of extraordinary circumstances, which the Board was not persuaded existed in this case, conversions of the kind sought by the applicant herein ought not be permitted in the absence of consent from all those affected by the application.

8. The Board then proceeded with a hearing in which it received the evidence and representations of the parties with respect to all remaining matters arising out of and incidental to them.

9. The applicant and the respondent agreed that there were three employees in the bargaining unit on the date the application for certification herein was made; namely, Brian Ogden, Rudy Pilgrim, and Manuel Rodrigues. In support of its application, the applicant filed three pieces of documentary membership evidence in the form of certificates of membership. Each certificate contains the original signature of the member to whom it relates and indicates that monthly dues of \$20.00 were paid by each for at least one month within the six-month period immediately preceding the terminal date fixed for the application. Each certificate is checked and certified correct by an officer of the applicant. The applicant also filed a Form 80, Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency of its membership evidence.

10. On the basis of the evidence before it, the Board is satisfied that not less than thirty-five percent of the employees in the voting constituency in this application were members of the applicant trade union at the time the application was made. Consequently, the applicant was entitled to the pre-hearing representation vote it had requested.

11. There was a dispute, however, with respect to who was entitled to vote in that pre-hearing representation vote. (As a result of the issues in dispute in the application for certification, the Board ordered that all ballots cast be segregated and that the ballot box be sealed.) The parties agreed that Brian Ogden was entitled to vote. However, the respondent asserts that Rudy Pilgrim and Manuel Rodrigues were not at work in the bargaining unit on May 8, 1987 and that, in accordance with paragraph 11 of the Board's decision dated May 25, 1987 in the certification application herein, they were therefore not entitled to vote. The applicant agrees that they were not at work in the bargaining unit on May 8, 1987 but asserts that the respondent acted in a manner contrary to sections 64, 66, 70 and 79 of the *Labour Relations Act* when it transferred them out of the bargaining unit. The applicant submits that, in the circumstances, Pilgrim and Rodrigues were entitled to vote and that their ballots, if they or either or them voted, should be counted.

12. William Mitchison, the respondent's superintendent at its Hampton Green condominium job site (the only job site relevant to this application) was the only witness to testify before the Board with respect to the applicant's allegations that the respondent had breached the Act. There is nothing in the evidence before the Board or in Mitchison's demeanour to suggest that he was anything other than a credible witness.

13. The evidence reveals that Mitchison was the respondent's site superintendent at Hampton Green from the outset of that project. He experienced some difficulty in obtaining a crew to do

the necessary layout work on that site. However, in accordance with a practice which is common in the industry, he was able to "borrow" three employees (Ogden, Pilgrim, and Rodrigues) from an industrial, commercial and institutional job site of the respondent known as "A. C. Nielson" pending the anticipated arrival of two other employees; namely, Jack Van Walraven and Laurence Shepard, beginning in early May 1987. Ogden, Pilgrim and Rodrigues are all regular, long term employees of the respondent.

14. Between the week ending March 21, 1987 and the week ending May 2, 1987, Ogden, Pilgrim and Rodrigues alternated between the Hampton Green and A. C. Nielson job sites on an irregular basis. May 4, 1987 was the last day which either Pilgrim or Rodrigues worked at the Hampton Green site. Van Walraven was assigned to that site beginning May 5, 1987 and Shepard started there on June 1, 1987.

15. We are satisfied that although the respondent received notice of this application for certification at its head office on May 1, 1987, Mitchison had no knowledge of it until May 5, 1987, the day after he determined that Pilgrim and Rodrigues were no longer needed at the Hampton Green site and could return to the A. C. Nielson site from which they had come. It had also been determined by then that he would retain Ogden at Hampton Green in order to familiarize Van Walraven with the job site.

16. On the evidence before the Board, it appears that the transfer of Pilgrim and Rodrigues from the Hampton Green job site and the retention of Ogden there was done in the normal course of the respondent's operations in the circumstances. There was no suggestion in the evidence before the Board that the transfer of Pilgrim or Rodrigues was unexpected by anyone or that it was unreasonable for the respondent to have retained Ogden at the Hampton Green site in the circumstances.

17. Further, it is now well established that the Board will examine all of the circumstances surrounding the actions of a respondent employer in a context of an application for certification in order to ascertain whether any part of the motivation for actions taken by that employer were improperly motivated. We are satisfied that the conversations which Mitchison had with various employees at the job site on May 4, 1987 were innocent and had nothing to do with the application for certification herein. We are also satisfied that neither these conversations nor the transfers of Pilgrim and Rodrigues were tainted by any desire to frustrate this application for certification.

18. In the result, we are satisfied that the respondent did not breach sections 64, 66, 70 and 79, or any of them, of the *Labour Relations Act* as alleged by the applicant. Consequently, the complaint in Board File No. 0484-87-U is dismissed.

19. Consequently, as the parties agreed would be the case if the complaint was dismissed, Rudy Pilgrim and Manuel Rodrigues were not entitled to vote in the pre-hearing representation vote held in the application for certification.

20. It therefore appears that Brian Ogden was the only employee of the respondent eligible to vote. The Board will therefore direct that the ballot box be unsealed and Ogden's ballot, if he cast one, be counted unless, *within fourteen days of the date hereof*, any party objects, in writing, to that ballot, if any, being counted. The basis for any such objection should be fully particularized.

1028-89-R United Brotherhood of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, Applicant v. O. J. Pipelines Incorporated, Respondent

Bargaining Unit - Certification - Construction Industry - Plumbers Union seeking clarity note indicating that welders working in the plumbing trade were employees in the unit - Board's concern is that persons employed be lawfully so engaged in certification applications relating to units described in terms of compulsory certified trades - Welding not a separate trade nor the subject of a designation order - Board declining to give clarity note for welders

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *N. Wilson*.

APPEARANCES: *A. J. Ahee* and *M. Zangari* for the applicant; no one appearing on behalf of the respondent.

DECISION OF THE BOARD; September 21, 1989

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under clause (a) of section 139(1) of the Act on May 14, 1982, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

3. In paragraph 7 of its application herein, the applicant describes the unit of employees that it claims to be appropriate for collective bargaining as being:

All plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the Respondent engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman; and

All plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the Respondent in Board Geographic Area No. 19, excluding the industrial, commercial and

institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman.

In paragraph 10 of its application, the applicant requests “that a clarity note be added to the effect that welders working at the plumbing and steamfitting trades are employees in the bargaining unit”.

4. The respondent failed to file a reply, a list of employees in the bargaining unit for which the applicant seeks to be certified, or any other material whatsoever, either within the time fixed therefore in accordance with the *Labour Relations Act* and the Board’s Rules of Procedure or at all.

5. In circumstances such as these, the Board would normally proceed to process the application based on the material filed by the applicant pursuant to its powers under section 102(14) of the Act. However, the Board has recently indicated its concern with respect to whether the clarity note being requested herein is appropriate (see, for example, *Heritage Mechanical Ltd.*, [1988] OLRB Rep. June 596). The bargaining unit applied for in this application is, subject to the substitution of the geographic area(s) specific to each application, the applicant’s standard bargaining unit which the Board has, since the advent of provincial bargaining, historically found to be appropriate for collective bargaining in applications by affiliated bargaining agents of the designated employee bargaining agency referred to in paragraph 1 above which are made pursuant to section 144(1) of the Act. It was also the Board’s practice, prior to 1988, to issue a clarity note declaring that welders working in the plumbing or steamfitting trades are included in such a bargaining unit when it was requested to do so in such applications. The appropriateness of such a clarity note was raised as an issue, apparently for the first time, in *Orocon Inc.*, (Board File No. 2383-87-R) but that matter was disposed of without the issue being decided. Since then, no such clarity notes have been issued as far as we are aware. Nor has the issue been decided in any other case (in *Heritage Mechanical Ltd.*, *supra*, the application was disposed of by the Board without it being necessary to determine that issue).

6. Although section 6(1) of the *Labour Relations Act* gives the Board a discretion in determining “the unit of employees that is appropriate for collective bargaining”, that discretion is limited in applications for certification in the construction industry by sections 6(3), 119, 139 and 144 of the Act. All applications for certification in the construction industry must be made pursuant to sections 119 and 144 (*Clarence H. Graham Limited*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Limited*, [1983] OLRB Rep. March 407 and July 1104; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254 and [1989] OLRB Rep. March 234; *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682). Under the province-wide bargaining provisions of the Act, there are organizations of trade unions, called designated employee bargaining agencies, which are designated to represent in the industrial, commercial and institutional (“ICI”) sector of the construction industry those employees in certain specified trades or crafts (for our purposes those terms are synonymous) who are represented by the trade unions, known as affiliated bargaining agents, which constitute them. A trade union which is an affiliated bargaining agent of a designated employee bargaining agency may, at its option, apply for certification under either section 144(1) or (3), or enter into voluntary recognition agreements under section 144(4). Trade unions which are not represented by a designated employee bargaining agency, and which are therefore not affiliated bargaining agents to which sections 144(1) through (4) of the Act apply (such as the Christian Labour Association of Canada) can apply for certification or enter into voluntary recognition agreements in the construction industry under section 144(5).

7. The designation orders issued pursuant to section 139(1) of the Act describe the provin-

cial units of employees for the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades, and designate, for each such provincial bargaining unit, an employer and an employee bargaining agency. In effect, such designation orders designate the trades which "belong" to each employee bargaining agency and its affiliated bargaining agents for purposes of the province-wide collective bargaining scheme. In the result, employee bargaining agencies and their affiliated bargaining agents can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (*Ninco Construction Ltd.*, *supra*; *Manacon Construction Limited*, *supra*; *Superior Plumbing & Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228; *Ellis-Don Limited*, *supra*; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Indeed, the structure of the Act *requires* an affiliated bargaining agent to seek bargaining rights for all employees in the trade(s) which its employee bargaining agency has been designated to represent in bargaining in the ICI sector (in the pertinent designation order) when making an application for certification which relates to that sector (*Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe a bargaining which relates to the ICI sector in a manner which is inconsistent with the applicable designation order. To accommodate the designation system, and recognizing that trade union representation in the construction industry has historically been along trade lines, the Board's practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and to use the words of the applicable designation order.

8. Pursuant to the designation order referred to in paragraph 1 above, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada, has been designated to represent in bargaining in the ICI sector of the construction industry" all Journeymen and Apprentice Plumbers and Pipefitters" represented by its affiliated bargaining agents .

9. Sections 1(a) and (b), 9 and 11 of the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980, Chapter 24, provide that:

1. In this Act,

- (a) "apprentice" means a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade;
- (b) "certified trade" means a trade designated as a certified trade under section 11;

...

9.-(1) Every person who commences to work at a trade for which an apprentice training program is established but who does not hold a certificate of apprenticeship or qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and
- (b) within three months after commencing to work in that trade, file with the Director his contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of the period

of three months mentioned in clause (1)(b), cease to work in that trade until he files with the Director his contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

11.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

10. It is evident from the Board's decisions in cases like *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C T Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563; *Phase IV (4) Electrical Contractors Limited*, Board File No. 2792-87-R, unreported decisions dated March 25, 1988 and July 5, 1988), and *B. C. Meck*, [1988] OLRB Rep. June 546 that the focus of the Board's concern in applications for certification relating to bargaining units described in terms of compulsory certified trades is that persons working or employed in such trades be lawfully so engaged before they are considered to be employees for certification purposes. Consequently, the Board has applied the *Apprenticeship and Tradesmen's Qualification Act* in such cases in determining the list of employees in such bargaining units for certification purposes.

11. Pursuant to Regulations 52 and 59 (R.R.O. 1980) respectively under the *Apprenticeship and Tradesmen's Qualification Act*, the trades of "plumber" and "steamfitter" are compulsory certified trades. The Board has determined that the labels "pipefitter" and "steamfitter" are synonymous for purposes of the *Labour Relations Act* (*D. E. Witmar Plumbing and Heating Limited*, *supra*, at paragraph 9). Consequently, a person must be either a journeyman or apprentice in the plumbing or steamfitting trades within the meaning of the *Apprenticeship and Tradesmen's Qualification Act* to be able to lawfully work or be employed as a plumber or steamfitter respectively in the Province of Ontario.

12. In *P & M Electric (1982) Ltd.*, [1989] OLRB Rep. June 638, the Board observed that:

9. The *Apprenticeship and Tradesmen's Qualification Act* is a statute of general application in the Province of Ontario. Its purpose is to regulate the training and qualifying of tradesmen and, in the case of a compulsory certified trade, to regulate the persons who can work at various trades so designated. Although it is not for this Board to enforce statutes like the *Apprenticeship and Tradesmen's Qualification Act*, the Board is, in our view, obligated to not make decisions or

proceed in ways which are inconsistent with laws of general application which are specifically directed at matters with which it must be concerned in the course of exercising its powers in performing the duties conferred or imposed upon it by or under the *Labour Relations Act*.

10. In our view, it would be inconsistent with the *Apprenticeship and Tradesmen's Qualification Act* for the Board to find that persons who are neither qualified journeyman nor apprentices, within the meaning of that legislation, to be in a bargaining unit which relates to a compulsory certified trade for the purpose of certification proceedings before the Board. Further, the issue of community of interest in trade or craft bargaining units is determined primarily on the basis of the skills and working conditions which are characteristic of employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development and operation of businesses and trade unions in that industry along trade or craft lines. Both the structure of the *Labour Relations Act* and the Board's approach to the construction industry recognize that (see *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, particularly at paragraphs 37-46). In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen's Qualification Act*.

(See also *McLeod et al. v. Egan et al.*, (1974) 46 D.L.R. 3rd 150) S.C.C.); *Re Ontario Hydro and Ontario Hydro Employees Union, Local 1000 et al.* (1983) 41 O.R. 2nd 669 (Ont. C.A.)). We agree and find that reasoning equally apposite to this case which deals with the compulsory certified trades of plumbing and steamfitting.

13. Having regard to section 144(1) of the *Labour Relations Act*, the provisions of the *Apprenticeship and Tradesmen's Qualification Act* and Regulations thereunder, and the designation order referred to in paragraphs 1 and 8 above, the Board is satisfied that a person must be a journeyman or apprentice plumber or steamfitter, within the meaning of the *Apprenticeship and Tradesmen's Qualification Act* in order to be counted as an employee in a bargaining unit described in terms of such tradesmen in an application for certification which relates to the ICI sector of the construction industry.

14. This brings us to the question of whether welders said to be working in the plumbing or steamfitting trades can be considered to be employees in such a bargaining unit. We note that while welding is subject to the provisions of the *Boilers and Pressure Vessels Act*, R.S.O. 1980 Chapter 46, it has not been recognized as a separate trade either under the *Apprenticeship and Tradesmen's Qualification Act* or by the Board. Nor is either welding or welders the subject of any of the designation orders which have been issued to date. Indeed, a number of construction industry trade unions, including the applicant, claim some type of welding as part of their trade jurisdiction.

15. In the result, we find ourselves constrained to conclude that the only persons who perform welding functions who should be included as employees in a bargaining unit of plumbers and steamfitters are those who are either journeymen or apprentices in one or other of those trades.

16. Counsel for the applicant referred us to the Board's decision in *Rainscreen Metals Systems Incorporated*, [1989] OLRB Rep. May 482 in which the Board found it appropriate to stipulate in a clarity note that sheeters, sheeters' assistants and material handlers were employees in a bargaining unit of journeymen and apprentice sheetmetal workers. The trade of sheetmetal worker is a compulsory certified trade under the *Apprenticeship and Tradesmen's Qualification Act*. However, there is no indication that the appropriateness of that clarity note was put in issue in that proceeding. Nor is it obvious that the employees working as sheeters, sheeters' assistants and material handlers to which that clarity note refers were other than apprentice or journeymen sheetmetal

workers. Finally, the “Sheet Metal Workers” designation entitles the employee bargaining agency named therein to represent journeymen and apprentice sheetmetal workers *and* sheeters, sheeters’ assistants and material handlers. (There is no reference to welders in the designation order which governs this application). Consequently, the *Rainscreen* decision is readily distinguishable from this case.

17. Counsel for the applicant also complained about the unfairness that would result from a decision which precludes the applicant and its employee bargaining agency from becoming the exclusive bargaining agents of welders who are engaged in the plumbing or steamfitting trade but who are neither journeymen nor apprentice plumbers or steamfitters. He set out the example of construction industry employers who employ primarily or exclusively such welders. Indeed, it appears that it is not uncommon for both unionized and non-unionized employers to employ welders who are neither journeymen nor apprentice plumbers or steamfitters to perform work generally considered to be in the plumbing or steamfitting trade.

18. The Board is not unaware or unsympathetic to the dilemma faced by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada in this respect, particularly since a significant number of its members are (so we understand) welders who are or neither journeymen nor apprentice plumbers or steamfitters. The Board also accepts that, to the extent that it is possible, the Board’s practices and policies should reflect and be responsive to the real world of labour relations rather than *vice versa*. However, the applicant cannot have it both ways. Either the *Apprenticeship and Tradesmen’s Qualification Act* applies or it does not. The applicant has consistently argued in cases before the Board that it does apply, and the Board, as the *Irvcon Roofing & Sheetmetal (Pembroke) Ltd.* line of cases illustrates, has accepted that argument. As the Board pointed out in *P & M Electric (1982) Ltd.*, *supra*, it is not for this Board to enforce the *Apprenticeship and Tradesmen’s Qualification Act* as such.

19. The Board is an administrative tribunal established by the *Labour Relations Act* to administer and apply that legislation. As such it is empowered and obligated “to determine all questions of fact or law that arise in any matter before it” (section 106(1)). However, as a creature of statute, the Board has no powers other than those conferred upon it by or under the *Labour Relations Act* (or other legislation which delegates powers to it; see, for example, section 24 of the *Occupational Health and Safety Act*, R.S.O. 1980 Chapter 321). Consequently, although it is obliged to apply laws of general application the Board has only those powers which have been conferred upon it by statute. The Board has no separate or additional inherent or equitable jurisdiction to “do what it thinks is best”. In the Board’s view, the solution to any difficulties which may be occasioned by the conclusions it has found itself constrained to arrive at in this case are to be found, if at all, in another forum.

20. We understand that the Ontario Pipe Trades Council has requested that the Minister amend the present designation order so that the employee bargaining agency referred to in paragraph 1 above would be entitled to represent in bargaining in the ICI sector “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices and all qualified welders working in the plumbing and steamfitting trades”. Although that may be a solution, we observe that adopting that approach would seem to create a conflict between the designation order and the *Apprenticeship and Tradesmen’s Qualification Act*. On the other hand, this kind of apparent conflict has existed for some years between the sheetmetal workers designation and the *Apprenticeship and Tradesmen’s Qualification Act* (see *E. S. Fox Limited*, [1989] OLRB Rep. July 738).

21. In the result, the Board is satisfied that it is unnecessary to include the clarity note requested by the applicant herein insofar as it relates to welders who are either journeymen or

apprentice plumbers or steamfitters. The Board is also satisfied that the clarity note is not appropriate insofar as it relates to other persons employed as welders working in the plumbing or steamfitting trades since those persons are not properly included as employees in the bargaining unit applied for herein for certification purposes.

22. Further, and having regard to the material before the Board, and pursuant to section 144(1) of the *Labour Relations Act*, the Board finds that all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors other than the industrial, commercial and institutional sector of the construction industry within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

23. In support of its application, the applicant filed documentary evidence of membership in it in the form of six combination application for membership and receipt cards. All six cards contain the original signature of the person with respect to whom they are submitted and each indicates that a payment of \$1.00 has been made with respect to membership in the applicant within the six-month period immediately preceding the terminal date fixed for this application. The cards and money were collected by one person who countersigned the receipts on behalf of the applicant. The applicant also filed a Form 80, Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency of its membership evidence.

24. The Board is satisfied on the basis of all the evidence before it, that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 3, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

25. Consequently, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 1 above in respect of all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

26. Further, and also pursuant to section 144(2) of the Act, a certificate will issue to the applicant with respect to all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, and save and except non-working foreman and persons above the rank of non-working foreman.

2241-86-R The Society of Ontario Hydro Professional and Administrative Employees, Applicant v. **Ontario Hydro**, Respondent v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, Intervener v. The Coalition to Stop the Certification of the Society on behalf of certain employees, Tom Stevens, C. A. Stevenson, and Michelle Morrissey-O’Ryan and George Orr on behalf of certain objecting employees, Objectors

Certification - Employee - Evidence - Practice and Procedure - Witness - Board direction to file and exchange documents on which parties intend to rely - Respondent employer concerned that it could not approach employees who may be summonsed for examination in order to obtain information and documents - No property in a witness - Proper for a party to communicate with any examinee before he or she begins testifying if it is for the purpose of obtaining information relevant to the proceedings

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; September 14, 1989

1. In our decision of July 13, 1989, we gave directions with respect to the examination of persons whose employee status as of the application date is in dispute. One of those directions was that

7. No less than ten days before the commencement of an examination with respect to an individual whose employee status as of November 5, 1986 is in dispute,
 - (a) each party to that dispute shall file with the Board the documents on which it relies in connection with that dispute; and,
 - (b) with respect to each document on which it relies, deliver to the other parties either a copy of the document or a list of documents relied upon which identifies that document with particularity.

In a letter to the Registrar dated August 21, 1989, the respondent (“Hydro”) states that this provision was the subject of discussion at a meeting of representatives of Hydro and the applicant (“the Society”), during which

... the Society expressed the view that all documentation to be used in any part of the duties and responsibilities phase must be produced ten days before an employee’s examination.

The letter goes on to say that

Ontario Hydro is prepared to provide official job documents such as job specifications and descriptions in accordance with paragraph 7. Bearing in mind that the employee is the witness of the Labour Relations Board raises concerns in our mind as to the impact of advance consultation with witnesses which would be required by either parties to produce all relevant documentation. There will also be other documents that may be properly and normally identified during the course of an employee’s examination that could not be relied on because they were not produced prior to the examination.

Because of the latter concerns, Ontario Hydro believes that the documentation referred to in paragraph 7 should be interpreted as “relevant Job documents”.

In a letter to the Registrar dated August 23, 1989, the Society refers to Hydro’s letter of August

21, 1989, confirms that it is its position that paragraph 7(a) of the Board decision dated July 13, 1989 requires the prior disclosure of *all* documentation upon which the parties intend to rely, and asks "that the Board determine this question."

2. We intended paragraph 7 of our order of July 13, 1989 to require that each party produce by the stated deadline each and every document *in its possession, custody or power* on which it wishes to be able to rely thereafter. While it seems implicit that a party cannot be expected or compelled to produce a document which is not in its possession, custody or power, the parties' correspondence suggests to us (whether they intended it do so or not) that that requires clarification. Accordingly, subparagraph 7(a) of our decision is hereby amended to replace the word "documents" with the phrase "documents in its possession, custody or power" and subparagraph (b) is amended to replace the phrase "document on which it relies" with the phrase "document referred to in subparagraph (a)".

3. We note that documents in the possession of an examinee as a result of the exercise of his or her duties and responsibilities as an employee of the respondent would ordinarily be documents in the possession, custody or power of the respondent as a matter of law. The fact that the examinee will be served with a summons in no way prevents the respondent from obtaining information and documents from him or her before the examination. In that respect it does not matter who pays the conduct money which accompanies the summons, nor whether the examinee's examination will begin with questioning by a labour relations officer or by a representative of one of the parties. There is no property in a witness; the Board certainly claims none in its proceedings.

4. It is entirely proper for a party to communicate with any examinee before he or she begins testifying if the communication is for the purpose of obtaining from the examinee information relevant to the proceedings at hand. We see no reason for concern about any party's consulting any examinee for that purpose. Indeed, the Board expects that all parties will make every effort to fully inform themselves with respect to the issues in dispute at the earliest possible time.

1310-89-R International Brotherhood of Painters & Allied Trades, Local 205, Applicant v. Westdale Painting & Decorating Ltd., Respondent

Certification - Construction Industry - Practice and Procedure - Respondent employer requesting hearing in construction industry certification application - Board discussing membership evidence system in Ontario and certification procedure in the construction industry - Hearing denied - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

DECISION OF THE BOARD; September 22, 1989

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades is that designated employee bargaining agency. It has been designated to represent, among others, journeymen and apprentice painters repre-

sented by its affiliated bargaining agents in bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include *all* employees who would be bound by a *provincial* agreement *together* with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

[emphasis added]

3. The applicant seeks to be certified as the exclusive bargaining agent for employees of the respondent in what is, in effect, one of its standard construction industry bargaining units; namely, all journeymen and apprentice painters in the employ of the respondent in the ICI sector of the construction industry in the Province of Ontario and all journeymen and apprentice painters in the employ of the respondent in all sectors of the construction industry excluding the ICI sector in Board Area 26, save and except non-working foremen and persons above that rank. In its reply, the respondent seeks to limit the bargaining unit to all journeymen and apprentice painters in its employ in the ICI sector of the construction industry in the Regional Municipality of Hamilton-Wentworth and the City of Burlington.

4. In addition, the respondent requests, in paragraph 14 of its reply, that the Board hold a hearing with respect to this matter. In support of that request, it states:

- (a) The Respondent is a small painting contractor, operating primarily in the industrial and institutional sectors in the cities of Burlington and Hamilton.
- (b) Wage rates paid by non-union contractors are significantly different from the wage rates paid by union contractors within the geographic area in which the Respondent carries on business.
- (c) The Respondent, in part because of its wage structure, has been a successful bidder on a number of industrial and institutional jobs, which contracts are to be performed in the fall/winter of 1989-1990.
- (d) The Respondent is seriously concerned that its employees are certified, and the Respondent therefore obligated to pay the prevailing wage rates, it will be unable to perform the aforesaid contracts in an economical manner and will therefore suffer substantial financial losses.
- (e) The Respondent is of the opinion that its employees have been misled or not informed by the Applicant of the effect that certification will have upon them, given the nature of the Respondent's business activities. The Respondent is of the opinion that if its employees were fully and fairly informed of these facts, that those employees would elect to discontinue this application.

- (f) The Respondent therefore respectfully requests that the Board order a vote to determine the true wishes of the employees.

5. The general certification process in Ontario is well established and has been described by the Board in numerous previous decisions (see, for example, *London Soap Company Limited*, [1987] OLRB Rep. Feb. 241 at paragraph 12; *Famz Foods Limited*, [1985] OLRB Rep. June 857 at paragraphs 10 to 14; *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraphs 15 to 17). In essence, the *Labour Relations Act* provides that the certification of trade unions in this Province is based primarily upon an assessment of a trade union's membership support in an appropriate bargaining unit, as evidenced by membership records filed in support of an application for certification. The Board does not inquire into why employees do or do not support an application for certification, or into opinions about the virtues of trade union representation, except insofar as such opinions are voiced in the form of a trade union's documentary membership evidence and any timely statements of desire filed in opposition to the application. The representation vote exists as a mechanism for ascertaining the wishes of the bargaining unit employees in circumstances where the applicant trade union has filed membership evidence with respect to more than forty-five percent of such employees but does not have the support (as evidenced by membership documents) of more than fifty-five percent of them which is required for outright certification under section 7(2) of the Act, or where the circumstances are such that the Board is satisfied that it is appropriate to exercise its discretion to require that a representation vote be held notwithstanding that the trade union has filed documentary evidence showing that more than fifty-five percent of the bargaining unit employees support its application. In certification proceedings, the Board places heavy reliance upon the membership evidence filed by the trade union. Because of the consequences of the reliance which the Board places on what is a form of hearsay evidence which is not (normally) disclosed to the employer or any other party to a certification proceeding, and which is not (normally) subject to cross-examination, the Board requires a high standard of integrity in the nature and quality of membership evidence filed. It is for this purpose that an applicant is required to file a Declaration Concerning Membership Documents (in Form 9 or Form 80 as the case may be), which attests to the regularity and sufficiency of its membership evidence in every application for certification (see *Grant Construction*, [1989] OLRB Rep. July 766; *Lonco Construction Limited*, [1989] OLRB Rep. March 274; *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223).

6. The same general considerations apply to applications for certification in the construction industry (see, for example, *Lonco Construction*, *supra*; *Capital Construction Corporation*, [1988] OLRB Rep. Aug. 747). However, all applications for certification in the construction industry must be brought pursuant to section 144 of the *Labour Relations Act*; (*Clarence H. Graham Limited*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Limited*, [1983] OLRB Rep. March 407 and July 1104; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254 and [1989] OLRB Rep. March 234). Applications, like this one, under section 144(1), of the Act can only be brought by an affiliated bargaining agent. Every such application must relate to a bargaining unit which includes "... all employees who would be bound by a provincial agreement [as defined in section 137(e) of the Act] together with all other employees in at least one appropriate geographic area ..." [emphasis added]. Consequently, an applicant trade union's right to certification is determined on the basis of the membership support it demonstrates within a single bargaining unit consisting of all ICI employees which the trade union's designated employee bargaining agency is entitled to represent in bargaining and all other such employees (see *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166) in one or more appropriate geographic areas. If the respondent employer has employees in more than one geographic area, a trade union may, at its option, make its application with respect to any or all such areas (see *Dagmar Construction Limited*, [1987] OLRB Rep. Apr. 480). The fact that the respondent

employer may have had no non-ICI employees at work on the date of application (which is the relevant date: see, among others, *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220; *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41) does not affect the trade union's right to seek to be certified for an employer's non-ICI employees in an appropriate geographic area (see *Watcon Inc.*, [1981] OLRB Rep. Nov. 1697). (Similarly, a trade can obtain ICI bargaining rights under section 144(1) even if the respondent employer had no employees working in that sector on the date of application: see *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729.) It is only after the Board determines that a trade union is entitled to be certified as the bargaining agent of the employees in the single bargaining unit applied for that the Act stipulates, in section 144(2), that the Board issue two certificates, one confined to the ICI sector, and one in relation to all other sectors of the construction industry in the geographic area(s) concerned. In the result, a trade union's right to be certified under section 144(1) is determined on the basis of its support in *one* bargaining unit, but if it is successful it receives *two* certificates; that is, certificates for two bargaining units (see *Fred Jantz Masonry Construction Company Limited*, [1986] OLRB Rep. Aug. 1083).

7. The construction industry provisions of the *Labour Relations Act* generally, and specifically section 102(14), together with the Board's Rules of Procedure in such applications, enable the Board to dispose of such applications in an expedited manner without an oral hearing. Section 97 of the Board's Rules of Procedure requires a party requesting a hearing to set out, in writing, the material facts upon which it relies, the relief it seeks, and the submissions it proposes to make at the hearing in support of its request. The Board will not hold a hearing where irrelevant reasons are given in support of a request for one, or where the employer questions whether its employees really wish to be represented by the applicant but fails to particularize its assertions in that respect. (We observe that any party which makes allegations, in any proceedings before the Board, of irregular or improper conduct (including allegations of improprieties in the solicitation or collection of membership evidence) is obliged to give notice and full particulars of those allegations (see section 72 of the Board's Rules of Procedure *Lonco Construction Limited*, *supra*, *Unlimited Textures Company Limited*, *supra*). Generally, a hearing becomes necessary only when there is a dispute with respect to some material fact or issue which cannot be resolved or disposed of by the Board without a hearing (see *B. Maskell Limited*, [1989] OLRB Rep. Apr. 319; *Black & McDonald Limited*, [1987] OLRB Rep. Oct. 1208.

8. The size in an employer's business, the areas in which an employer primarily carries on its business, and the impact which certification may have on an employer are irrelevant to the Board's considerations in determining whether an applicant trade union is entitled to be certified. Further, the respondent in this case has offered no basis for the speculations in paragraph 14(3)(e) of its reply. The Board is satisfied that this application can be disposed of on the basis of the material filed, and that the respondent has offered no cogent reason for the Board to hold a hearing. The respondent's request for a hearing is therefore denied.

9. It is evident that the respondent's bargaining unit description is not appropriate because it is limited to the ICI sector in a limited geographic area. Further, the Regional Municipality of Hamilton-Wentworth and the City of Burlington do not constitute an "appropriate geographic area". It has been left to the Board to determine what constitutes an appropriate geographic area (see *Hydro Electric Power Commission of Ontario*, [1966] OLRB Rep. Nov. 596). Thirty-two such areas have been established by the Board. The Regional Municipality of Hamilton-Wentworth and the City of Burlington are, together with that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, in Board area 26.

10. Having regard to the material before it, the Board finds, pursuant to section 144(1) of

the Act, that all journeymen and apprentice painters in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice painters in the employ of the respondent in all other sectors of the construction industry (that is, excluding the industrial, commercial and institutional sector) in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The respondent filed a list of employees in the bargaining unit (and specimen signatures therefore) containing nine names on Schedule A. In support of its application, the applicant filed thirteen pieces of documentary membership evidence in the form of combination application for membership and receipt cards. All of these contain the name and original signature of the persons with respect to whom they are filed and indicate that a \$1.00 payment has been made by them with respect to membership in the applicant within the six-month period immediately preceding the terminal date fixed for this application. The cards and money were collected by more than one person. The applicant also filed a Form 80, Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency of its membership evidence.

12. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 5, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

13. As indicated above, the respondent requested that a representation vote be taken in this application. In our view, however, it has offered no cogent reason for the Board to order such a vote. There is nothing before the Board which suggests why the applicant ought not be certified without the taking of a representation vote. The respondent's request for a vote is therefore denied.

14. In the result, and pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 1 above in respect of all journeymen and apprentice painters in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman.

15. Further, and also pursuant to section 144(2) of the Act a certificate will issue to the applicant in respect of all journeymen and apprentice painters in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, excluding the industrial, commercial and institutional sector, and save and except non-working foremen and persons above the rank of non-working foreman.

COURT PROCEEDINGS

0310-87-R (Court File No. 67/89) Cuddy Chicks Limited, Applicant v. Ontario Labour Relations Board and United Food and Commercial Workers International Union, Local 175, Respondents

Certification - Charter of Rights and Freedoms - Constitutional Law - Judicial Review - Employees working under conditions akin to those in a factory - Employees responsible for monitoring the development of embryonic chickens - Employees found by Board to be persons employed in agriculture - Board holding that it has jurisdiction to entertain union's challenge that exclusion of persons employed in agriculture is contrary to the Charter - Employer bringing application for judicial review on the grounds that, *inter alia*, the Board erred in law in finding itself to be a "court of competent jurisdiction" and in finding it has the authority to apply the Charter by virtue of s.52 of the *Constitution Act, 1982* - Judicial review dismissed by Divisional Court - Appeal dismissed by Court of Appeal

Board decision found at [1988] OLRB Rep. May 468. Divisional Court decision released November 2, 1988.

Court of Appeal, Grange, McKinlay, and Finlayson (dissenting) JJ.A., September 8, 1989:

Grange J.A.: This appeal concerns the right (or perhaps the right and the duty) of the Ontario Labour Relations Board to consider the constitutionality of a section of its constituent act forbidding the certification of agricultural workers. It is vital that we bear in mind that the issue is not whether the section is constitutional but whether the Ontario Labour Relations Board can consider the issue at all or whether it must accept the statutory prohibition and leave the constitutional question to others, presumably the courts. The constitutional question is whether the provision of the Ontario Labour Relations Board Act (the Act) which provides:

2. This Act does not apply,

• • •

(b) to a person employed in agriculture, hunting or trapping.

is contrary to s.15(1) of the *Canadian Charter of Rights and Freedoms* ("the Charter") which provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The application of the respondent Union is for certification of workers of the appellant who have been found by the Board to be agricultural workers. Eventually it will have to be determined if s.2(b) of the Act is contrary to s.15 of the *Charter*. The issue before us, however, as I have said is only whether the Board can consider that question.

The Board itself found that it could and should, and proposed that evidence and argument on the merits of the constitutionality of s.2(b) of the Act be heard. Before that hearing could be held the employer (Cuddy) brought an application for Judicial Review to the Divisional Court. That court dismissed the application and this appeal is brought with leave upon three questions as follows:

(1) Is the Ontario Labour Relations Board "a court of competent jurisdiction" under s.24(1) of the Charter?

(2) Does s.52 of the Charter confer authority upon the Ontario Labour Relations Board separate and apart from s.24(1) to apply the Charter? (The reference should, of course, have been to s.52 of the *Constitution Act, 1982*. That section is not part of the *Canadian Charter of Rights and Freedoms*.)

(3) Does the Ontario Labour Relations Board have jurisdiction to apply the Charter by virtue of any duty to consider statutes bearing on proceedings before it?

Section 24(1) of the *Charter* and s.52(1) of the *Constitution Act* are as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The first question was considered at length by the Board and in some detail by the Divisional Court. Reference was made by both bodies to the decision of the Supreme Court of Canada in *Mills v. The Queen*, 29 D.L.R. (4th) 161 which adopted the definition of "court of competent jurisdiction" proposed by Brooke J.A. in *R. v. Morgentaler et al.* 14 D.L.R. (4th) 184 at 190 and to the variation in the English and French versions of s.24 (the latter refers not to "court of competent jurisdiction" but to "un tribunal competent", and to the many cases decided by courts other than the Supreme Court of Canada. Included among these are many in the Divisional Court itself -- see *Ontario Public Service Employees Union v. Algonquin College*, June 29, 1987, *St. Lawrence College v. OPSEU*, April 13, 1988 (leave to appeal to the Court of Appeal granted June 27, 1988) and *Greater Niagara Transit Commission v. The Amalgamated Transit Union* (1987), 61 O.R. (2d) 565 at 578, 584, all to the effect that a statutory Board of Labour Relations was not a court of competent jurisdiction for the purpose of s.24.) The contrary conclusion was reached in the British Columbia Court of Appeal in *Moore v. B.C. Government* (1988), 3 W.W.R. 289.

In my view, it is quite unnecessary to answer this question in the case at bar. Section 24 of the Charter is designed, as I see it, to give a remedy to the citizen when his rights under the Charter have been infringed, where a remedy is required to right the wrong done to him, and where no remedy exists in the ordinary course. As McIntyre J. said in *Mills* at p.172:

The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

In *Mills*, the accused claimed to have been deprived of a speedy trial as required under s.11(b) of the Charter. If that were so or were threatened, he clearly would have need of a remedy, either by way of a stay or an acceleration of his trial. That remedy could be given only by "a court of competent jurisdiction" or (in the French version) "un tribunal competent" which prompted the debate as to whether a Magistrate or Provincial Judge presiding at a Preliminary Hearing constituted that court. Where governmental action or inaction is contrary to the Charter, a remedy may be necessary and resort for that purpose may have to be made to s.24. But where no special remedy is required s.24 need not be resorted to. Here the whole question is the constitutionality of a section of a statute. If the section is constitutional, it will be applied; if it is not, it will be ignored. It may

be, of course, that if a declaration of invalidity is sought, that remedy can only be given by a "court" in the traditional sense. But no declaration is here sought. What is asked for is what is clearly within the jurisdiction of the Board, namely the granting or not of the certification application.

And that of course brings us to the second issue upon which leave to appeal was granted. It is repeated for convenience:

Does s.52 of the Charter confer authority upon the Ontario Labour Relations Board separate and apart from s.24(1) to apply the Charter?

Section 52(1) declares the supremacy of the Constitution of Canada which of course includes s.15 of the *Charter* which s.2(b) of the Act is alleged to violate. The problem in this and in the third question is simply whether the Ontario Labour Relations Board can (or must) consider the constitutionality of the section in the course of determining whether in fact and in law the Union is entitled to certification of the employees in question.

I should not oversimplify the issue but the question keeps rising in my mind -- why should anyone think otherwise? The Ontario Labour Relations Board is a body that is constantly making judicial and legal decisions. It is required by its constituent statute (s.106) to determine all questions of fact or law before it. Questions of law must include the supreme law of Canada, namely the Constitution. Where a statutory provision is unconstitutional it is contrary to law and has no effect.

We start with the celebrated dictum of Dickson J. in *R. v. Big M. Drug Mart Limited* (1985), 18 D.L.R. (4th) 321 at p.367:

If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the *Constitution Act, 1982*, s.52(1), is to give the court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect". [Emphasis added.]

The dictum is obiter because the case dealt with the constitutionality of the *Lord's Day Act* which was before the courts in a criminal prosecution but it is obiter dictum entitled to the utmost respect and insofar as I am aware the only pronouncement on the question from our highest court.

The question of the power of an administrative tribunal to deal with Charter questions has not been dealt with directly in this court or the Supreme Court of Canada although there have been several decisions approving the exercise of constitutional decision-making by tribunals in the division-of-power cases particularly as they relate to labour relations -- see for example, *Northern Telecom v. Communication Workers* (1981), S.C.R. 115; *Four B. Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031; and *Canada Labour Relations Board v. L'Anglais Inc.* (1983), 1 S.C.R. 147 at 158. The Charter problem has, however, received much consideration recently in the Federal Court of Appeal and has resulted in decisions that are not totally consistent. Many of these cases are considered in the judgment of Pratte J. in *Poirier v. Minister of Veterans Affairs*, 29 March 1989. One of the cases there referred to is *Re Tétreault-Gadoury and Canadian Employment and Immigration Commission et al.* (1988), 53 D.L.R. (4th) 384 where, in dealing with an issue relating to Unemployment Insurance benefits, a question arose as to whether a provision of the *Unemployment Insurance Act* denying relief to a person over 65 years of age was contrary to s.15 of the Charter. Lacombe J., with whom Hugessen J. concurred, said that the board of referees set up under the *Unemployment Insurance Act* erred when they refused to consider arguments against the constitutional validity of the section prohibiting recovery by a claimant over 65 years of age.

Madame Justice Desjardins, also concurring, had this to say after quoting s.52(1) of the Charter at p.413:

It should not be a matter for surprise that individuals claiming to have such rights assert them before agencies created to provide a speedy determination of their rights in relation to governmental authority. Many writers have noticed the anomalous position in which agencies find themselves when, on the one hand, they are responsible for applying the law, and on the other, are required to determine whether legislation is of no force or effect under the Charter. None the less, if such agencies are responsible for interpreting the law, they must deal with the issue in its entirety, subject to judicial review.

I need hardly say that I am in entire agreement with the decision reached in *Re Tétreault-Gadoury* and in the reasons above cited. I may say also that it is conceded that on judicial review no curial deference will be shown to the tribunal.

The most articulate view in opposition to that expressed in *Tétreault-Gadoury* is that of Marceau J. In *Poirier*, he gave it as his opinion that:

...an administrative tribunal, attached by definition to the executive branch of government, could not allow itself to refuse to apply a statute of Parliament or a Legislature on the basis that such statute appeared to it to violate the constitution of the land. In my opinion, the very principle of the rule of law and the fundamental division of powers between the legislature, executive and judiciary of the State, which not only have been formally confirmed in the *Constitution*, but which in fact are a prerequisite to it insofar as they underlie it, stand against such refusal. Only the courts of law, forming the judicial branch of government, have the power to contest the validity of the edicts of the legislative branch and to nullify their effect. In my mind, this applies as much and in the same way to a legislative provision which would be *ultra vires* because it ran counter to the division of powers established in sections 91 and 92 of the *Constitution Act, 1867*, as it does to a legislative provision which could be seen as infringing a provision of the *Charter* and which therefore should be said to be *inoperative*.

With the greatest respect, I cannot see why an administrative tribunal committed to decide matters according to law and in all probability particularly qualified in the field of law and on the facts relating to the subject, cannot be entrusted to make the preliminary decision on this subject. It seems to me far more convenient to have the facts gathered and assessed together with the law in the first instance rather than to have the legal issue deferred with the distinct possibility that the facts may be found deficient when the law finally comes to be decided.

Marceau J. rejects this argument of convenience. He states in *Poirier*, "As soon as a party to a dispute, where the constitutionality of a statute has been called into question becomes unhappy with the decision of the administrative tribunal and such would doubtless be the rule given the importance of disputes of this nature the common law courts will be called on to intervene. Where then would be the advantage in time and cost?" The answer to the question may be "often none" but I find it comforting that there have been many decisions by labour boards on constitutional matters that have gone unchallenged -- see for example *Overwaitea Foods Division of Jim Pattison Industries Ltd. and Vancouver, New Westminster and District Building and Construction Trades Council* (1987), 14 C.L.R.B.R. (NS) 268, *Union of Bank Employees (Ontario Local 2104 and Bank of Montreal and Richard Savard)* (1985), 10 C.L.R.B.R. (NS) 129, *United Food and Commercial Workers' International Union et al. v. Frederick Transport Limited* (1988), 88 C.L.L.C. p.14,126, and *Dominion Paving Limited v. Labourers' International Union of North America, Local 183* (1986), O.L.R.B. (Rep.) July, 946.

The Ontario Labour Relations Board is indeed an administrative tribunal but it is one of considerable antiquity and vast experience in labour matters and in resolving legal and factual disputes. It is, of course, not infallible and as I have stated, when its decisions on constitutional issues are chal-

lenged it will receive no curial deference. Nevertheless, it has the right and duty to test the constitutional validity of its own statute, certainly where the question is raised as it is here. It should proceed to do so.

The answer to question 2 makes it unnecessary to consider question 3. It follows from the reasoning I have expressed that the Board should consider all statutes bearing upon its decisions. Of prime importance is the Constitution, the supreme law of the land.

I would dismiss the appeal. The respondent union should have its costs of the appeal against the appellant employer. There should be no costs to the respondent Ontario Labour Relations Board or to the Attorney General.

FINLAYSON J.A. (dissenting): I have the opportunity of reading the reasons of Grange J.A. and respectfully disagree with them for the reasons set out below.

The appeal, with leave of this court, is from the order of the Divisional Court dated November 7, 1988, on the following points of law:

- (1) Is the Ontario Labour Relations Board (the "Board") a "court of competent jurisdiction" under s.24(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter")?
- (2) Does s. 52(1) of the *Constitution Act*, 1982 confer authority upon the Board, separate and apart from s.24(1), to apply the provisions of the *Charter*?
- (3) Does the Board have jurisdiction to apply the *Charter* by virtue of any duty to consider statutes bearing on proceedings before it?

The questions are not set out in the formal order granting leave to appeal and, as framed by the appellant, do not accurately reflect the most important issue which was argued before us at length. The third question should have been expanded to make it clear that the issue is the authority of the Board to give effect to a *Charter* argument directed towards the validity of its own enabling statute. The question as modified calls forward a different answer.

The facts are straightforward. On April 29, 1987, the United Food and Commercial Workers International Union, Local 175 (the "Union") filed an application for certification before the Board with respect to certain persons employed by Cuddy Chicks Limited ("Cuddy Chicks") in its hatchery in Jarvis, Ontario. Cuddy Chicks responded by asserting that it employed these persons in agriculture and, thus, the *Ontario Labour Relations Act*, R.S.O. 1980, c.228 (the "Act") did not apply by virtue of s.2(b) of that statute which provides:

2. This Act does not apply,

- (b) to a person employed in agriculture, hunting or trapping.

On filing its application for certification, the Union gave notice that should these persons be found to be employed in agriculture, it would request the Board to hold s. 2(b) of the Act invalid on the ground that it violates ss.2(d) and 15 of the *Charter*. A document styled "Notice of Constitutional Question" was served by the Union on the Attorney General of Ontario. By letter dated May 20, 1987, the Attorney General indicated it would not participate in the hearing before the Board but would intervene should the matter proceed to the Supreme Court of Ontario.

Cuddy Chicks disputed the Board's jurisdiction to entertain a request under the Charter to strike down a provision of its own statute.

A separate hearing was convened on February 8, 1988, by a panel composed of Patricia Hughes, Vice-Chairman, and Board members J. Ronson and R. Montague to consider arguments with respect to the *Charter* issue. The decision of the panel on this matter was reserved.

On March 1 and 2 and April 28, 1988, a hearing was held before the same panel on the issue of whether the subject employees of Cuddy Chicks were persons employed by Cuddy Chicks in agriculture and thus outside the ambit of the Act. At the conclusion of argument on April 28, 1988, the panel rendered an oral decision holding unanimously that the employees of Cuddy Chicks were persons employed in agriculture and not covered by the Act. However, a majority of the panel, with Board member Ronson dissenting, went on to hold that the Board had the jurisdiction to determine whether s.2(b) of the Act was in violation of the *Charter*. A written decision dealing with both issues was rendered on May 6, 1988.

An application by way of judicial review was made by Cuddy Chicks to the Divisional Court and was dismissed without costs by order dated Wednesday, November 2, 1988. In this appeal, the appellant asks that the order of the Divisional Court be reversed and that this court make an order:

(1) granting the application for judicial review and quashing the decision of the Board dated May 6, 1988;

(2) declaring that the Board has no jurisdiction to apply the provisions of the *Charter*.

While we are not obliged to deal with the merits of the *Charter* challenge, counsel advised that it would focus on ss.2(d) and 15(1) of the *Charter* which read as follows:

2. Everyone has the following fundamental freedoms:

(d) freedom of association.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It was submitted by counsel for the respondent, with the support of the intervenors, that jurisdiction to assert a *Charter* remedy could be found in s. 24(1) of the *Charter* and 52(1) of the *Constitution Act*, 1982. They read as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Before discussing the issues in detail, I note that three things were conceded:

(1) the nature of the discrimination alleged is not enumerated in s.15(1) of the *Charter*;

(2) the Board does not have the authority under s.24(1) to make an adjudication *in rem* that s.2(b) of the Act is unconstitutional or inoperative;

(3) any decision of the Board invoking the *Charter* is not subject to curial deference (see *Re S.E.I.U. and Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225, 13 D.L.R. (4th) 220 (Ont. C.A.).

The unusual feature of the case on appeal is that the Union is applying for certification of a class of workers which the Board has found as a fact are excluded from its jurisdiction by a provision of its own Act. Having anticipated that finding, the Union initiated an argument that s.2(b), in excluding persons employed in agriculture, contravenes the *Charter*.

The Board in its decision stated:

The Board has held since the enactment of the Charter that it has jurisdiction to entertain Charter issues arising in matters before it by virtue of section 52 of the Charter [sic]: *Third Dimension Manufacturing Limited*, [1983] OLRB Rep. Feb. 261. This approach has been consistently followed by the Board; see, for example, *Shaw-Almex Industries Limited*, [1986] OLRB Rep. Dec. 1800 (application for judicial review dismissed, unreported decision of the Divisional Court, February 11, 1988; application for leave to appeal to the Court of Appeal dismissed, February 22, 1988).

In *Third Dimension Manufacturing Limited*, the Board set out its position on this issue and distinguished it from that of its sister board in the United States at para. 20, p.264:

The *Charter of Rights and Freedoms* establishes for Canadians rights which are of fundamental importance and which must be respected at every level of the legal process. All who administer the law are necessarily governed by its requirements and protections. Policemen and prosecutors, for example, must be guided by the rights of a person subject to a criminal charge and arrest. The courts and tribunals like this Board are governed by the guarantee of fundamental justice enshrined in section 7 of the Act. In that sense this board must interpret and abide by the Act in its day-to-day proceedings, being ever mindful of the legal paramountcy of the Charter as reflected in the provisions of section 52(1) of the *Canada Act*: [sic]

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

For many years the National Labour Relations Board has taken the position that it should decline to pass on a challenge to the constitutionality of any provision of the *National Labour Relations Act*. Its first reported comment in that regard appears to have been made in *re Rite Form Corset Co. Inc. and United Steelworkers of America C.I.O.* (1947) 75 NLRB 174, 21 LRRM 1011. In that case the Board was asked to declare, among other things, that sections 9(f) and (h) of the *National Labour Relations Act*, which barred hearings by the Board of representation cases brought by unions which failed to comply with certain registration and disclosure provisions under the Act, were unconstitutional. The Board applied the sections and dismissed the applications stating (at 21 LRRM 1012):

As an administrative agency of the Federal Government, it is inappropriate for the Board to pass upon questions regarding the constitutionality of Congressional enactments. Such questions will be left to the courts. In the absence of any court decision to the contrary, the Board assumes that the Act as amended does not violate any provision of the Constitution of the United States, as alleged by the petitioner.

It seems to me that support for the exercise by the Board of jurisdiction to apply the *Charter* can only be found in s.52(1) of the *Constitution Act*, 1982. The Board is of this view as illustrated in the *Third Dimension* case. Unfortunately it also thinks of itself as a court of competent jurisdiction under s.24(1) of the *Charter* as appears from its decision before the court. It argues that it, like any other tribunal, is obliged to apply the supreme law of Canada, and if it finds that any statute, including its own enabling statute, fails to meet the requirements of that law, then it has the power,

in effect, to ignore the offending provisions. But it is one thing to conform to the law and another thing altogether to be a law making body. Section 52(1) is merely declaratory of the law. It says nothing more than that the Constitution is supreme. It does not fashion a remedy.

Section 24(1), on the other hand, is procedural in that it gives any person with a case capable of sustaining a *Charter* argument the right to take the initiative and apply to a court of competent jurisdiction to seek whatever remedy that court considers appropriate and just in the circumstances. It permits such a court to grant declaratory and other relief and its judgment or order becomes a part of the law of the land. Its adjudications are *in rem*.

The Board justified its posture in the following language:

The starting point for determining whether the Board is "a court of competent jurisdiction" is its authority as granted by the *Labour Relations Act*. The Board's jurisdiction, prior to and independently of the *Charter*, is found in sections 106(1) and 108 of the Act:

106.(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

108. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review prohibit or restrain the Board or any of its proceedings.

Together these sections give the Board exclusive jurisdiction to deal with all matters arising under the Act, including the power to deal with matters of law arising in matters properly before the Board.

The Board expressly agreed with counsel for Cuddy Chicks that it was not empowered to declare its Act or any provision of it invalid. It conceded that "the power to make a *declaration* of invalidity rests with the superior courts". It went on to state "[h]owever, a finding that a provision is inconsistent with the *Charter* on the basis that the provision is of no force or effect does not constitute a declaration, but is 'a decision of a legal question properly before the court'".

I have to say that I do not understand the distinction between the Board, on the one hand, declaring a provision of its own statute invalid and proceeding with the offending section deleted and, on the other hand, holding that the provision is of no force or effect and proceeding as if the section did not exist. However, that was precisely the position the Board took as can be seen from the following:

Having considered the case law and the policy reasons advanced by counsel, we continue the approach set out in *Third Dimension*, *supra*, and the cases following it, of entertaining *Charter* issues arising in applications and complaints brought under the Act. Given the jurisdiction "to determine all questions of...law that arise in any matter before it", the Board is required to consider those questions in light of the *Charter*'s constitutional supremacy over all other laws, including the Ontario *Labour Relations Act*. With respect to subsection 24(1), we are satisfied for the reasons given above that the Board constitutes "a court of competent jurisdiction" with respect to matters properly before it. We do not consider this an appropriate case in which the "presumption" (as that term takes its meaning from *Mills*, *supra*, and *Rahey*, *supra*) in favour of the forum in which the matter would normally proceed should be displaced: the union's application for certification is properly before us, as are the union and the employer; we have the authority to grant certification, the remedy sought by the union. The employer objects to the

application on the basis of section 2(b) of the Act; the validity of section 2(b) has been brought into issue by the union and in our view, we could not lawfully dismiss this application on that basis until we had determined that the agricultural exemption is consistent with the Constitution.

In my view, this is where the Board fell into fundamental error. There is no question that under s.106(1) the Board has jurisdiction in the exercise of its powers to determine questions of law including questions about its own jurisdiction. In doing so, it cannot disregard the law of the land including the Constitution of Canada. It is bound by decisions of the superior courts of Ontario and the Supreme Court of Canada. It must make decisions and does make decisions with respect to the separation of powers under the Constitution. In that regard it is in no different position than any other decision making body, but I do not concede that it can *ex proprio motu* initiate constitutional attacks on provincial and federal legislation. It must abide by any ruling of a court of competent jurisdiction as to the constitutionality of provincial and federal statutes, but it is not in itself a court of competent jurisdiction.

The issue, is the board a court of competent jurisdiction? becomes somewhat blurred in s.24(1) of the *Charter* by the use of the word "court" in the English version of "court of competent jurisdiction" and the word "un tribunal" in the French version. Each, of course, is equally authentic. (see s.9 *Official Languages Act*, R.S.C. 1985, c.O-3.)

I would have thought that the French version of "court" would be "un cour" and the English version of "un tribunal" would be "tribunal". The French version appears to be a broader term than the English, but I do not see this as a conflict. The name "court" has no magic in this context. It appears to me that we still must determine what judicial body has the authority to make the determinations under the *Charter*. As was said by Lord Edmund-Davies in *Attorney General v. B.B.C.*, [1980] 3 All E.R. 161 at p.175:

At the end of the day it is unfortunately to be said that there emerges no sure guide, no unmistakable hallmark by which a court...may unerringly be identified.

The Board and counsel for the Union have fixed on the language of Chief Justice Dickson in *The Queen v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.) where he stated at p.353:

If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the Constitution Act, 1982, s.52(1) is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect". That, in my view, is the position in respect of the Lord's Day Act. [Emphasis added.]

Counsel for the respondent, relying on the reference to "court or tribunal" in what was clearly an *obiter* statement, submitted that the Chief Justice was stating that any "court or tribunal" was a s.24(1) court of competent jurisdiction. It appears to me that this is a misreading of the passage quoted. The *Charter* in this situation is a shield. Section 52(1) is the vehicle that makes it available. The Chief Justice is stating that any adjudicative body with jurisdiction to apply the law in its decision making process must give effect to s.52(1) of the *Constitution Act*, 1982. It does not have to be able to exercise s.24(1) powers in order to do so. It is my view that the use of this language with respect to s.52(1) does not alter the essential test as to what constitutes a court of competent jurisdiction under s.24(1) of the *Charter*. That test is set out in *Mills v. The Queen* (1986), 29 D.L.R. (4th) 161 (S.C.C.).

Before dealing with *Mills*, I should go back to the *res* of *Big M.* where the Chief Justice earlier set out this distinction. In *Big M.*, a drug supermarket was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the *Lord's Day Act*. It raised as a defence to the prosecution that the *Lord's Day Act* was unconstitutional because of the *Charter*. The standing and jurisdiction

of the accused to make the challenge was raised and the Supreme Court of Canada held that an accused, whether corporate or individual, could defend a criminal charge by arguing the constitutional validity of the law under which the charge was brought. This issue was dealt with squarely by the Chief Justice at p.313:

Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the *Charter* have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s.24 is unnecessary and the particular effect on the challenging party is irrelevant.

Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575) but that was not the reason for its appearance in Court.

Mills v. The Queen, *supra*, dealt with the power of a provincial court judge presiding at a preliminary hearing to exercise jurisdiction under s.24(1) of the *Charter*. The court held that he did not.

McIntyre J. in giving the reasons for the majority stated at p.171:

To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislature of the various provinces and by the Parliament of Canada. It is not for the judges to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. In fact, the jurisdictional boundaries created by Parliament and the Legislatures are for the very purpose of restraining the courts by confining their actions to their allotted spheres. In s.24(1) of the *Charter* the right has been given, upon the alleged infringement or denial of a *Charter* right, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The *Charter* has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply in a court which has jurisdiction. It will be seen as well that it prescribes no remedy but leaves it to the court to find what is appropriate and just in the circumstances.

The questions then arise as to which of the courts are courts of competent jurisdiction within the meaning of s.24(1) of the *Charter* and what is the nature of the remedy or remedies which may be given. In attacking these problems, that of jurisdiction and that of remedy, the courts are embarking on a novel exercise. There is little, if any, assistance to be found in decided cases. The task of the court will simply be to fit the application into the existing jurisdiction scheme of the courts in an effort to provide a direct remedy, as contemplated in s.24(1). It is important, in my view, that this be borne in mind. *The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure.* There is no need for special procedures and rules to give it full and adequate effect. [Emphasis added.]

In *Mills*, McIntyre J. specifically approved the language of Brooke J.A. in *R. v. Morgentaler, Smoling and Scott* (1984), 14 D.L.R. (4th) 184 (Ont. C.A.) at p.190 which he quoted at p.177:

The meaning to be ascribed to the phrase "court of competent jurisdiction" in s.24(1) of the *Charter* has been the subject of consideration in a number of cases. The weight of authority is that s.24(1) does not create courts of competent jurisdiction, but merely vests additional powers in courts which are already found to be competent independently of the *Charter*. We agree with Mr. Doherty that a court is competent if it has jurisdiction, conferred by statute, over the person and the subject-matter in question and, in addition, has authority to make the order sought.

The court presided over by Associate Chief Justice Parker was the court of competent jurisdiction to which the accused could apply under s.24(1). It has declared that the rights and freedoms guaranteed to the accused by the Charter have not been infringed or denied by charging them under the section of the *Criminal Code* upon which the count in the indictment was founded. Section 24(1) does not purport to create a right of appeal or bestow appellate powers on this or any other court. Rather it authorizes those courts which have statutory appellate jurisdiction independent of the Charter to exercise the remedial power in s.24(1) in appropriate cases when disposing of appeals properly brought before the court.

McIntyre J. picks up on the necessity of a right of appeal from the court or tribunal which entertains a s.24(1) application. There is no right of appeal from a decision of the Board, and statutory review is not a substitute. Lack of curial deference to its decisions is not the equivalent of appellate review of findings of fact or statements of administrative policy that can be critical to a s.1 defence to a *Charter* attack on s.2(b) of the Board's Act. McIntyre J. said on this point at p.176:

Again, it must be observed that the *Charter* is silent on the question of appeals and the conclusion must therefore be that the existing appeal structure must be employed in the resolution of s.24(1) claims. Since the *Charter* has conferred a right to seek a remedy under the provisions of s.24(1) and since claims for remedy will involve claims alleging the infringement of basic rights and fundamental freedoms, it is essential that an appellate procedure exist. There is no provision in the *Code* which provides a specific right to appeal against the granting, or the refusal, of a *Charter* remedy under s.24(1), but appeals are provided for which involve questions of law and fact. The *Charter*, forming part of the fundamental law of Canada, is therefore covered and the refusal of a claim for *Charter* relief will be appealable by a person aggrieved as a question of law, as will be the granting of such relief by the Crown. The appeal will follow the normal, established procedure. *When the trial is completed, the appeal may be taken and the alleged error in respect of the claim for Charter relief will be a ground of appeal.* [Emphasis added.]

Earlier in *Mills*, McIntyre J. laid down three prerequisites of a s.24(1) court when he stated at pp.173-4:

- (i) These courts will be courts of competent jurisdiction where they have jurisdiction conferred by statute over the offences and persons and power to make the orders sought.
- (ii) A claim for remedy under s.24(1) arising in the course of the trial will fall within the jurisdiction of these courts as a necessary incident of the trial process.
- (iii) Consideration of convenience, economy and time will dictate that remedies under s.24(1) will ordinarily be sought in the courts where the issues arise. Save for cases originating and proceeding in the superior court, resort to it will be necessary only where prerogative relief is sought.

It was submitted that the first of the three prerequisites laid down in *Mills* provided that the court or tribunal must have:

- (a) jurisdiction over the person;
- (b) jurisdiction over the subject matter;
- (c) jurisdiction to grant the remedy requested.

Looked at in one way, these tests in *Mills* are readily met in the case on appeal. There is no question that the Board has jurisdiction over the Union, the employer, (Cuddy Chicks) and can grant the relief sought, namely certification of the Union as the bargaining agent of the employees of Cuddy Chicks. There also is no question that the Board can examine the facts to determine if it has jurisdiction over the subject matter of the application (see division of constitutional powers cases such as *Windsor Airlines Limousine* (1980), 177 D.L.R. (3d) 400 at 403 (Ont. Div. Ct.); *R. v. OLRB ex Parte Dunn* (1963), 39 D.L.R. (2d) 346 at 352 (Ont. Div. Ct.); *Northern Telecom v.*

C.W.C. (1979), 98 D.L.R. (3d) 1 at 19-20 (S.C.C.) and *Four B. Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 (S.C.C.)).

It is my view, however, that once the Board found as a fact that its jurisdiction was clearly excluded by its own enabling statute, then that was the end of the matter. While it had power to grant the remedy sought, i.e. certification, its findings of fact precluded any result but a dismissal of the application. It surely cannot seek to enlarge its jurisdiction by entertaining a *Charter* challenge with respect to its enabling statute and thereby include within its administrative ambit a class of workers that its legislature as a matter of policy has deliberately left out of the legislative scheme. To do so would hardly comply with the second prerequisite of *Mills*, *supra*, which contemplates a claim for a remedy under s.24(1) arising as a necessary incident of the hearing process.

The correct disposition of the application to the Board was made by Board member Ronson in his dissent. He stated:

In section 2 of the Act the legislature tells the Board that it has no authority to apply the provisions of the Act to the labour relations between employers and employees engaged in agriculture. We may not like that restriction. In some cases before the Board, the hearing panel has indicated its displeasure with the situation. Nevertheless, in its wisdom, the Legislature has seen fit to retain the exclusion both after those Board decisions and the enactment of the Charter. The Legislature has continued to reserve to itself the social policy considerations pertaining to employment in the agricultural sector.

The National Labour Relations Board in the United States takes a different approach than that of the Board. In the *Third Dimension* case, *supra*, the Board made it clear at para.22, p.265 that the approach of the NLRB did not appear to be compelling or appropriate in the context of the law of Canada particularly with respect to the “imperatives of s.52(1) of the Canada Act [sic]”. This not an appropriate distinction. Article VI of the *American Constitution* has language which is very similar to our s.52(1). It reads as follows:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or law of any state to the contrary notwithstanding. [Emphasis added.]

Text writers in the United States set out the rationale for the approach of the NLRB. In “The Authority of Administrative Agencies to Consider the Constitutionality of Statutes” [1977] *Harvard Law Review*; Vol.90:1682 the authors dealt specifically with Article VI of the *Constitution* and stated at p.1692-93:

Having dispensed with constitutional arguments against the agency powers herein urged, it is necessary to ask whether the Constitution -- regardless of congressional action -- *compels* agencies to rule on the validity of legislative enactments. Such a suggestion is implicit in the reasoning of the California Supreme Court in *Southern Pacific Transportation Co.* and its reliance, by analogy, on *Marbury v. Madison*. The argument follows two closely parallel lines. First is the suggestion that the oath to uphold the Constitution required by Article VI of all public officials creates a duty not to enforce invalid laws and therefore a duty to inquire into and pass judgment on legislative pronouncements. Second is the broader proposition that the responsibility to decide what the law is and apply it must include a concomitant duty to inquire into the law's validity. Each of these lines of reasoning, however, proves far too much. No one would suggest that all those who swear to uphold the law and must apply it -- whether they be police officers, low level administrators, or notaries public -- are required by the Constitution to pass upon the validity of legislative enactments. On the contrary, *courts have generally held that legislative enactments are presumptively valid and that officials should act accordingly, notwithstanding oaths of office or law-interpreting responsibilities. Exceptions to this proposition are appropriate where a judicial ruling has squarely refuted the presumption of validity, or where a statute is so*

flagrantly unconstitutional as the defy any presumption to the contrary. But such exceptions in no way suggest a broader constitutional requirement that all officials evaluate the statutes under which they labor. [Emphasis added.]

To the same effect is K. C. Davis, *Administrative Law Treatise* (2nd edition) (West Publishing Co.: 1983), Vol. 4 at p.434:

This question differs from the one discussed in 26:4 because an agency may always determine questions about its own jurisdiction but generally lacks power to pass upon constitutionality of a statute. The law has long been clear that agencies may not nullify statutes. *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958); *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (Harlan, J., concurring); *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Moore v. City of East Cleveland*, 431 U.S. 494, 526 (1977) (Burger, C.J., dissenting). *No federal court has adopted the California view that an agency may determine the constitutionality of a statute.* *Southern Pac. Transp. Co. v. Public Utilities Commission*, 18 Cal.3d 308, 556 P.2d 289 (1976); 90 Harv. L. Rev. 1682 (1977). [Emphasis added.]

Reference has already been made to *Rite Form Corset Company Inc.*, 75 N.L.R.B. 174 (1947) at p.176 in the *Third Dimension Manufacturing* case, (*supra*). I also cite *Delta Airlines*, 11 L.R.R.M. 1159 (1982) at p.1163:

Respondent further contends that if the handbilling and advertisements are not privileged under the proviso, they are nevertheless protected by the first amendment to the Constitution and thus cannot be found unlawful by the Board. *We have consistently taken the position that, as an administrative agency created by Congress, we will presume the constitutionality of the Act we are charged with administering, absent binding court decisions to the contrary.* Since we have found that Respondent's conduct is unlawful under Section 8(b)(4) because it is coercive and engaged in for a secondary object, and is not saved by the publicity proviso, we shall presume that our finding of a violation here is in accordance with the Constitution and Congress intent to outlaw secondary boycotts. [Emphasis added.]

I have also considered *Pet Incorporated*, 244 N.L.R.B. 30,188 (1978) and *Corry Foam Products*, C.C.H., N.L.R.B. 32,179 (1973).

There was another matter argued with vigour by counsel for the appellant and that was the issue as to the qualifications of the members of the Board to embark on this type of sophisticated inquiry and adjudication. I reject this submission entirely and can think of no reason why persons who are appointed to this body should not have the qualifications to apply the law and to consider constitutional arguments as they have in the past. I am really more concerned about the appropriateness of the Board embarking on the inquiry at all. This is the "[c]onsideration of convenience, economy and time..." referred to in the third prerequisite of *Mills*, *supra*.

As has been noted, s.2(b) and its exclusion of agricultural workers is a non-enumerated head of discrimination under s.15(1). There are a number of classes of employee excluded under s.2. While we may speculate as to why some of the others have been singled out, it is not obvious to me that the exclusion of agricultural workers raises a *prima facie* case of discrimination. The Attorney General has declined to intervene at the Board stage in the case on appeal, and we are advised by his counsel that this has been the practice of that Ministry. There is only one exception he can recall and that was when an adjournment was sought because the matter in issue was being currently determined in a court of law. I would think it inappropriate for the Attorney General to make submissions on this subject to nominees of the government he represents, but this being so, who is to carry the burden before the Board of upholding the constitutional validity of the legislation? If the government of the day is not prepared to defend this exclusion in the Act, it should amend the statute and delete it. If it proposes to defend it, then it is the only party to these proceedings which has the knowledge and resources to do so.

It appears to me to place an unfair burden upon Cuddy Chicks to justify a piece of legislation that it had no part in enacting. There must have been some policy reason for excluding agricultural workers which is known to the government but not necessarily to Cuddy Chicks. The first issue is whether there is a discriminatory practice in excluding them. That is difficult enough by itself, but on what factual, social or historical basis could Cuddy Chicks rely on s.1 of the *Charter* to submit that s.2(b) is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society"? If there is no record before the Board on this issue, what is the Divisional Court to do with it on an application for judicial review? It is then much too late for the Attorney General to introduce evidence. It seems to me in terms of convenience and expediency that this whole matter ought to be resolved at one time in one place, and that is on an application in the Supreme Court of Ontario to which the Attorney General would be a party. All of the arguments and evidence in relation to the issues could be fully explored in accordance with the principles discussed in *Andrews v. The Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.) and there would be a proper record for appeal if necessary.

Counsel for the respondent relied heavily on *McLeod v. Egan* (1974), 46 D.L.R. (3d) 150 (S.C.C.) as authority for the Board to apply the *Charter* to a statute, even if it is its own enabling statute. In *Egan*, the Supreme Court of Canada held that there was an obligation upon an arbitrator to construe a statute if it related to the issue in a grievance before him. In that case an arbitrator selected under a collective bargaining agreement was dealing with a conflict between that agreement and the *Employment Standards Act* 1968 (Ont.) c.35. Laskin C.J.C. stated at 151:

Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator, chosen by the parties or in accordance with their prescriptions, who interprets a document which is in language to which they have subscribed as a domestic charter to govern their relationship.

Egan, of course, is pre-*Charter*, but it is argued, and I think correctly, that the reasoning of Laskin C.J.C. would bring s.52(1) into play. It is submitted that further support for the proposition that the Board is bound to apply the *Charter* is found in *Slaight Communications Incorporated v. Davidson*, a decision of the Supreme Court of Canada, released May 24, 1989. The issue there was whether an adjudicator determining a wrongful dismissal complaint under the *Canada Labour Code* could make an order directing the employer to prepare a letter of recommendation in a certain form without infringing the employer's freedom of expression guaranteed by s.2(b) of the *Charter*. The full court was of the view that any order that he made was subject to the *Charter*. Lamer J. stated at p.17:

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s.1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.

This, I think, brings us to the heart of the matter. Any court or tribunal is bound by the law and it cannot make orders or decisions that are contrary to law. In its deliberations it must determine what the law is insofar as it is applicable to the decision making process that is within its jurisdiction. It thus cannot "make an order which would result in an infringement of the *Charter*".

If one puts together the quotations above referred to by Dickson C.J.C. in *Big M.*, Laskin C.J.C. in *Egan*, and Lamer J. in *Slaight*, they amount to a statement that the Board in its deliberations must obey the supreme law of Canada and if, in the course of proceedings within its legislative ambit, it is confronted by a statute which is inconsistent with the *Charter*, it has a right and a duty to regard the inconsistent statute, to the extent of the inconsistency, as being no longer of force or effect. Its decision will then be in accordance with the law and the constitution, including the *Charter*. But it must be acting within its legislative ambit, and if that ambit excludes from its deliberations such groups of employees as firemen, policemen, teachers, domestics and agricultural workers, it exceeds its jurisdiction when it purports to entertain applications for certification with respect to them.

Putting the matter another way, how would an order of the Board dismissing the Union's application in the case on appeal result in an infringement of the *Charter*? Surely the Board is saying nothing more than it has no jurisdiction to certify the Union as the bargaining agent of the workers in question.

Going back again to *Mills* and that part of the first prerequisite that requires the Board to have power to grant the remedy requested and accepting, for the sake of argument, that s.2(b) of the Act violates s.15 of the *Charter*, what is the position of the Board? What remedy can it make available to the union? Section 52(1) of the *Constitution Act*, 1982 does not empower it to fashion a remedy, it instructs it to obey the law. The Board believes that it can do so by simply ignoring the restriction imposed on it by s.2(b) of the Act. The effect of this is to expand its jurisdiction beyond its legislative mandate. This has been done by courts of competent jurisdiction in striking down discriminatory restrictions in statutes under s.24(1) of the *Charter* (see, for example, *Blainey v. Ontario Hockey Assoc. et al.* (1986), 54 O.R. (2d) 513 (Ont.C.A.)), but the delegatee of legislative authority remains the creature of its enabling statute. It cannot nullify any statute, much less its own. When applied to its own Act, a decision of the Board to treat a restriction on its mandate as of no force or effect amounts to a declaration of invalidity, an adjudication that it concedes it cannot make.

In *Blainey*, *supra*, Mrs. Blainey made a complaint to the Ontario Human Rights Commission concerning a ruling by the Ontario Hockey Association that her daughter could not belong to the O.H.A. because of her sex. Relying upon s.19(2) of its enabling statute, the *Human Rights Code* 1981 (Ont.), c. 53, the Commission advised that it had no jurisdiction to receive such a complaint. It was my opinion that the Commission should at least have entertained the complaint to determine the facts, but Dubin J.A., speaking for the majority of the court stated at p.519-20:

In other words, Mrs. Blainey was advised that, assuming that the O.H.A. by refusing to provide her daughter with their services and facilities was discriminating against her because of her sex, by reason of s.19(2) the O.H.A. would be within their rights, and the Ontario Human Rights Commission had no jurisdiction to assist Justine Blainey.

With due respect to the contrary view of my brother Finlayson, I think the Ontario Human Rights Commission was right. The legislation, *in its present form*, does permit the O.H.A. and, indeed, all others in this province who provide services and facilities with respect to membership in athletic organizations or participation in athletic activities, to deny equal treatment with respect to their services and facilities on the basis of sex. *The Human Rights Commission is bound by the mandate provided to it by the Legislature. They had no right to go behind it and*

were powerless to assist Miss Justine Blainey even if her complaint had been made out. [Emphasis added.]

The same approach was taken in *Re McKinney and Board of Governors of the University of Guelph et al. and eight other applications* (1987), 63 O.R. (2d) 1 (Ont.C.A.) when the same Commission ruled that a complaint of age discrimination in employment was not within its jurisdiction because the definition of age in the *Human Rights Code* did not include persons aged 65 years and over (see p.10).

In support of the respondent's submissions, reference was made to a number of decisions of the Federal Court of Appeal but, in my respectful view, they raise more problems for the Union's position than they resolve. The cases are: *Zwarich v. A.G. of Canada* (1987), 82 N.R. 341 (Fed. C.A.), *Robinson v. Attorney General of Canada*, unreported decision (Fed. C.A.) dated June 17, 1987, *Re A.G. of Canada v. Vincer* (1987), 46 D.L.R. (4th) 165, *A.G. of Canada v. Bibi Alli* (1988), 51 D.L.R. (4th) 555 (F.C.A.), *Nixon v. The Canadian Employment and Immigration Commission et al.* (1988), 33 C.R.R. 144, *Re Tétreault-Gadoury and Canadian Employment and Immigration Commission et al.* (1988), 53 D.L.R. (4th) 384 (Fed. C.A.), and *Poirier v. Minister of Veterans Affairs*, unreported decision (Fed. C.A.) dated March 29, 1989.

In *Zwarich*, the applicant under the *Unemployment Insurance Act, 1971*, had his claim rejected by the Commission because the Act in question did not permit benefits where loss of employment arose out of a work stoppage attributable to a labour dispute. The applicant submitted that this was contrary to ss.7 and 15 of the *Charter*. He advanced this argument unsuccessfully on appeals to a board of referees, an umpire, and the Federal Court of Appeal made up of Pratte, Heald and Mahoney JJ. However, Pratte J., for the court, criticized the umpire for failing to address the *Charter* arguments. He stated at p.342-3:

[3] It is clear that neither a board of referees nor an umpire have the right to pronounce declarations as to the constitutional validity of statutes and regulations. That is a privilege reserved to the superior courts. However, like all tribunals, an umpire and a board of referees must apply the law. They must, therefore, determine what the law is. And this implies that they must not only construe the relevant statutes and regulations but also find whether they have been validly enacted. If they reach the conclusion that a relevant statutory provision violates the *Charter*, they must decide the case that is before them as if that provision had never been enacted.

[4] The umpire had to decide whether the decision of the Board of Referees was in accordance with the law. This he could not do, in my view, without determining whether the statutory provision that had been applied by the Board was constitutionally valid.

Unfortunately, the court, while taking the same position as the Board in the case in appeal, was of no assistance as to what remedy was available to the applicant had his *Charter* argument found favour. We will see later that this is a very real problem.

In *Robinson*, argued immediately after *Zwarich* before the same court, the *Charter* argument related to a regulation passed under the same statute which treated payments under a wage-loss group insurance plan differently from those under a private insurance plan. Pratte J. again gave the decision of the court and stated at p.2:

In my reasons for judgment in the *Zwarich* case (a copy of which is attached), I say why, in my view, an umpire who is seized of an appeal from a board of referees must, like any other tribunal in a similar situation, form an opinion as to the constitutional validity of the legal provisions on which the board based its decision. The duty of the umpire is to decide whether the decision that is the subject of the appeal was legally made. In order to perform that duty, he must determine whether the legal provisions on which the board rested its decision did exist in law.

The umpire, therefore, should have considered the applicant's Charter argument. but he should have rejected it ... [Emphasis added]

In *Nixon*, the *Charter* attack was based on discrimination because of physical disability under the *Unemployment Insurance Act, 1971*. The reasons were delivered by the court comprised of Urie, Mahoney and Hugessen JJ. It stated at p.4:

The learned umpire declined to deal with that argument on the ground that he was not a tribunal of competent jurisdiction under section 24. In that, he was clearly wrong. This Court's unreported decision in *Zwarich v. A.G. of Canada*, rendered June 17, 1987, after the Umpire's decision, is conclusive of that.

Once again, the constitutional arguments were rejected and the application dismissed.

The consensus shown in *Zwarich* is not consistent throughout the Federal Court of Appeal decisions. In *Vincer*, a court composed of Pratte, Marceau and Stone JJ., while unanimous in the result, was divided in its reasoning. Here a review committee under the *Family Allowances Act, 1973* found that a regulation discriminating between male and female parents violated s.15 of the *Charter*.

Marceau and Stone JJ. were both of the opinion that the review committee had no mandate to determine whether *Charter* rights had been infringed or whether the *Canadian Human Rights Act*, S.C. 1976-77 c.33, was violated. Pratte J. stated that he was not prepared to concede that he was wrong in *Zwarich*, but was of the opinion that the review committee was wrong in finding a contravention of the *Charter*.

Marceau J. stated his opinion at pp.171-173:

With those precisions in mind, the issue to be determined can be formulated, in positive terms, as follows: is an administrative tribunal, set up as the ultimate level of an administrative process, entitled, in considering the claim put before it, to question the constitutionality of the legislative enactments it is its mission to apply? I will say without hesitation that I cannot see how the issue so formulated could be disposed of in a positive way.

...

First, with respect to the submission that jurisdiction could derive directly from s.24 of the *Charter*, it seems now firmly established that the *Charter* does not by itself confer jurisdiction on any court or tribunal. (See the comments of the Supreme Court judges, albeit in a criminal law context, in *Mills v. The Queen* (1986), 29 D.L.R. (4th) 161, 26 C.C.C. (3d) 481, [1986] 1 S.C.R. 863; see also *Moore v. The Queen* in right of B.C. (1986, 4 B.C.L.R. (2d) 247 (S.C.).) As I understand it, the jurisdiction of a statutory body must be found in statute and must extend not only to the subject-matter of an application and to the parties involved therein but also the remedy sought, and I fail to see here where the committee would find in the statute the power to order that benefits be paid as claimed.

...

Second, in reply to the submission that the committee did not make a declaration but only formed an opinion and took a view, I will only say that, considering it did not take that view academically but went on to act and decide on the sole basis of it, I fail to fully appreciate the distinction. That a tribunal validly constituted to exercise adjudicatory functions be entitled to consider and dispose of legal difficulties is easy to understand; it certainly has to interpret with regard to a particular set of facts the provisions of law it is called upon to apply. But to assert the unconstitutionality of one of these provisions and decide accordingly is, I believe, totally different from making an incidental or accessory finding on a question of law. It seems to me that, be it declaratory or not, a judgment has, outside the ambit of the parties, a binding effect only

to the extent of its authoritative status and then its *ratio decidendi* what is truly important about it.

Stone J. stated at p.175:

In my opinion, the tribunal is quite without any power under its mandate to determine whether rights enshrined in the *Canadian Charter of Rights and Freedoms* have been infringed or denied or whether the legislation is in conflict with the *Canadian Human Rights Act*, S.C. 1976-77, c.33. In particular, it signally lacks any power to grant a remedy under s.24(1) of the Charter. On the contrary, the tribunal's mandate is limited to determining on the basis of the statute as framed whether or not an allowance is properly payable having regard to the evidence presented and to the submissions made. In my view, it is not authorized to rule on the validity, constitutional or otherwise, of the statute and regulations.

Vincer underlines the problem of a statutory body applying the *Charter* to its own enabling legislation. In that case, having found the regulations permitting payment to be in violation of both the *Charter* and the *Canadian Human Rights Act*, the review committee had no place to go. It could only recommend that the regulations "be reviewed to enable proper accommodation of Mr. Vincer's case...". It had no regulatory power to make the payment to the husband that it wanted to. As was pointed out later by Lacombe J. in *Tétrault-Gadoury* at p.392:

The committee had thus ordered the departmental officials to do something not authorized by the Act; in doing this, it ordered a remedy which it thought was fair and reasonable under s.24(1) of the Charter, although the committee only had jurisdiction to decide appeals brought to it consistent with the *Family Allowances Act*, 1973, S.C. 1973-4, c.44, and regulations.

Similarly in *Bibi Alli*, the review committee felt that the provisions of the same statute directing payment of family allowances to a parent with visitor status, but not to a resident awaiting determination of his refugee status, contravened s.15 of the *Charter*. Having made this finding, it had no power to order the payment that would remedy the *Charter* violation. The Federal Court of Appeal (Pratte, Urie and Stone JJ.) followed *Vincer*, Pratte J. again noting that the committee could not help the applicant unless it could apply a new version of the regulation incorporating the changes necessary to make it constitutional.

In *Tétrault-Gadoury*, the Federal Court of Appeal (Hugessen, Lacombe and Desjardins JJ.) held that the commission, acting under the *Unemployment Insurance Act*, 1971 erred in not considering a constitutional challenge to a section of that Act which, it was said, discriminated against claimants aged 65 or over.

Lacombe J., speaking for the majority, stated at p.392:

In the case at bar it is s.52(1) of the *Constitution Act*, 1982, that is relied on, not s.24(1) of the Charter. The applicant has not asked the board of referees or this court to find that s.31 of the *Unemployment Insurance Act*, 1971 should be amended to make it consistent with s.15 of the Charter or to order a remedy that would require the adoption of appropriate legislative adjustments.

Rather, the only question is whether s.31 of the Act is of no force or effect as a whole because it is inconsistent with s.15 of the Charter. The applicant is not asking the court, to take an extreme example, to give her under the Charter the same benefits the Act gives a pregnant claimant or an adoptive mother. She is only seeking a finding, consistent with the requirements of the Charter, that s.31 of the Act is of no force or effect because it deprives her solely on account of her age of the unemployment insurance benefits given to other claimants who are in the same situation as she is, that is, unemployed and equally entitled to benefits.

It is noted that as in *Zwarich*, *Robinson* and *Nixon*, it was the tribunal of first instance that refused to apply the *Charter*. The Federal Court of Appeal here ruled that it should have and referred the

matter back to be reviewed. In this case the solution presumably would be to ignore the over 65 limitation and treat the claimant as if she was between 55 and 64. There is not much difference between this approach and re-writing the enabling statute.

The last case is *Poirier*, decided by a court composed of Pratte, Marceau and Desjardins JJ.. The reasons for judgment of Marceau J. are very detailed. Pratte J. concurs in the result and Desjardins J. concurs with him. Once again this is a case where sex discrimination is alleged as the *Charter* argument, but even granting the validity of the argument, the tribunal in question found itself powerless to grant relief.

Pratte J. in his reasons reviewed all of the above cases and in addition referred to *Sirois*, delivered June 24, 1988, which followed the reasoning of *Vincer*. He clearly recognized the problem that it was one thing to identify a *Charter* problem in a tribunal's enabling statute or regulation, but absent the power to fashion a remedy under s.24(1), a claimant such as *Poirier* achieved no more than a moral victory.

Marceau J. treated the *Tétreault-Gadoury* case as being wrongly decided. He stated at p.6:

I have already expressed my conviction to the effect that an administrative tribunal, attached by definition to the executive branch of government, could not allow itself to refuse to apply a statute of parliament or a Legislature on the basis that such statute appeared to it to violate the constitution of the land. In my opinion, the very principle of the rule of law and the fundamental division of powers between the legislature, executive and judiciary of the State, which not only have been formally confirmed in the *Constitution*, but which in fact are a prerequisite to it insofar as they underlie it, stand against such refusal. Only the courts of law, forming the judicial branch of government, have the power to contest the validity of the edicts of the legislative branch and to nullify their effect. In my mind, this applies as much and in the same way to a legislative provision which would be *ultra vires* because it ran counter to the division of powers established in sections 91 and 92 of the *Constitution Act, 1867*, as it does to a legislative provision which could be seen as infringing a provision of the *Charter* and which therefore should be said to be *inoperative*. I have explained my point of view at length in this regard in the case of *Attorney General of Canada v. Vincer*, [1988] 1 F.C. 714 and it is obviously not simply in order to repeat myself that I have wanted to write the present reasons.

The learned justice expressly rejected the argument that even though a tribunal is not a court of competent jurisdiction within the meaning of s.24(1) of the *Charter*, it can ignore or treat as inoperative any provisions of its enabling statute that it considers contrary to the law because of 52(1) of the *Constitution Act, 1982* (see pp.7-9).

He concluded at p.12:

Those were the additional remarks I wished to make to complete my thoughts as expressed in *Vincer, supra*. It remains for me to dispose of the case on the basis that, in my opinion, absent a declaration of unconstitutionality addressed to them by a court of law, administrative tribunals are bound to apply existing statutes, and cannot, in the performance of their mandate, take it upon themselves to set aside those that do not appear to them to conform to the *Constitution*. The conclusion is simple: since the Board in effect did no more than to apply the statute, its decision cannot be disturbed.

I agree with the conclusion of Marceau J. set out immediately above. It follows from this and what I have said earlier that I do not think that the Ontario Labour Relations Board is a court of competent jurisdiction within the meaning of s.24(1) of the *Charter*. While it is obliged to apply the law in making any decision properly before it, it cannot fashion such a remedy as is sought by the Union in the case on appeal by reference to s.52(1) of the *Constitution Act, 1982*. Accordingly, I would answer the questions put to us in the following manner.

(1) No. The Board is not a “court of competent jurisdiction” under s.24(1) of the *Charter*.

(2) Yes. 52(1) of the *Constitution Act*, 1982 does confer authority upon the Board, separate and apart from s.24(1) to apply the provisions of the *Charter*.

(3) This is the question that is badly worded. The answer is yes to the extent that this is a repetition of question (2), but no if it means that the Board can strike down, ignore, or treat as inoperative any portion of its enabling statute by reference to the *Charter*.

Accordingly, I would allow the appeal, set aside the order of the Divisional Court, and in its place make an order granting the application for judicial review and quashing the decision of the Board dated May 6, 1988 insofar as it asserts jurisdiction to entertain a *Charter* challenge to the validity of s.2(b) of the Act.

The appellant is entitled to its costs against the respondent Union here and below, including the costs of the application for leave to appeal. There should be no costs against the intervenors Ontario Labour Relations Board or The Attorney General for Ontario.

McKINLAY J.A.: For the reasons given by Finlayson J.A. I agree with him that the Ontario Labour Relations Board is not a “court of competent jurisdiction” under s.24(1) of the *Canadian Charter of Rights and Freedoms*. I agree with both Grange and Finlayson J.A. that s.52(1) of the *Constitution Act*, 1982 confers authority upon the Board to apply provisions of the *Charter*.

In addition, I consider that s.24(1) need not be resorted to to provide a remedy in a case such as this. Section 52(1) provides a remedy of its own in any situation where a law is inconsistent with the provisions of the *Constitution*, of which the *Charter* is a part -- namely, that “to the extent of the inconsistency” that law is “of no force and effect”. The court or tribunal involved need not make a declaration. If it determines that there is an inconsistency with the *Constitution*, the declaration is provided by the wording of s.52(1).

It seems to me that even a private individual may determine in his or her own mind whether a law is inconsistent with the provisions of the *Constitution*, and act accordingly. Of course, he acts at his peril, for he may be wrong. In the same way an administrative tribunal may be in error in determining that an inconsistency exists, and on appeal no curial deference will be afforded that determination.

At first, I had some concern that in this case a determination by the Ontario Labour Relations Board that s.2(b) of the *Ontario Labour Relations Board Act* is inconsistent with the *Constitution* would amount to a statutorily created body conferring jurisdiction on itself where none was conferred by its statute. However, were the question brought at first instance before the Supreme Court of Ontario, that court would have no more authority to confer jurisdiction than has the Ontario Labour Relations Board. This would seem to nullify the provisions of s.52(1) of the *Constitution* in many cases where the extent of the jurisdiction of a tribunal is in issue. It is, in my opinion, necessary to resolve this dilemma in favour of the efficacy of s.52(1) wherever possible. In this case, treating the exception in s.2(b) of the *Ontario Labour Relations Board Act* as having no force and effect merely results in the inclusion of those workers excepted from the application of the Act within the broad jurisdiction to certify unions conferred on the Board by the Act.

I agree with Grange J.A. for the reason articulated by him and for the short reasons above that the Ontario Labour Relations Board has the right and duty to test the constitutional validity of its own statute, and I would therefore dismiss the appeal with costs to be dealt with as set out in his reasons.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1989

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0011-89-R: Ontario Nurses Association (Applicant) v. Ontario Cancer Treatment and Research Foundation (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the Ontario Cancer Treatment and Research Foundation (London Regional Cancer Centre), London, Ontario, save and except program co-ordinator, nursing manager and lodge manager, and persons above the rank of program co-ordinator, nursing manager and lodge manager, persons in clinical trial positions and persons regularly employed for not more than 24 hours per week" (21 employees in unit) (*Clarity Note*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity regularly employed for not more than 24 hours per week by the Ontario Cancer Treatment and Research Foundation (London Cancer Centre), London, Ontario, save and except program co-ordinator, nursing manager and lodge manager, and persons above the rank of program co-ordinator, nursing manager and lodge manager, and persons in clinical trial positions" (8 employees in unit) (*Clarity Note*)

0097-89-R: United Food & Commercial Workers International Union, Local 175, AFL:CIO:CLC (Applicant) v. Funeral Financial Services Ltd. (Respondent)

Unit: "all employees of the respondent at Hamilton, save and except managers, persons above the rank of manager, office, and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit)

0138-89-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Jemcom Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the editorial department of Kitchener-Waterloo record division in the City of Kitchener, save and except editor, managing editor, assistant managing editor (news), assistant managing editor (features), editorial page editor, city editor, photo co-ordinator, news editor, sport editor, business editor, living editor, entertainment editor, assistant news editor (nights), newsroom secretary, persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the *Labour Relations Act*, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and interns while enrolled in a post-secondary journalism course" (66 employees in unit) (*Clarity Note*)

Unit #2: "all employees of the respondent in the editorial department of its Kitchener-Waterloo record division in the City of Kitchener regularly employed for not more than 24 hours per week, students employed during the school vacation period and interns while enrolled in a post-secondary journalism course, save and except editor, managing editor, assisting managing editor (news), assistant managing editor (features), editorial page editor, city editor, photo co-ordinator, news editor, sports editor, business editor, living editor, entertainment editor, assistant news editor (nights), newsroom secretary, persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the *Labour Relations Act*" (10 employees in unit) (*Clarity Note*)

0207-89-R: International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Applicant) v. 727849 Ontario Ltd. c.o.b. as Viscount Glass & Aluminum (Respondent) v. Group of Employees (Objectors)

Unit: “all journeymen and apprentice glaziers and metal mechanics in the employ of the respondent in its Viscount Glass Aluminium Division in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentices glaziers and metal mechanics in the employ of the respondent in its Viscount Glass Aluminium Division in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

0308-89-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. A & A Electrical Services Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0315-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. 754426 Ontario Ltd. c.o.b. as R & S Plumbing (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0496-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. FHR Construction Company Ltd. (Respondent)

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees of the respondent engaged as surveyors within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0659-89-R: Employees Association of Rochester Township (Applicant) v. The Corporation of the Township of Rochester (Respondent)

Unit: “all employees of the respondent in the Township of Rochester, save and except administrator-clerk and clerk treasurer and persons above the rank of administrator-clerk and clerk treasurer and employees regularly employed for not more than 24 hours per week” (5 employees in unit)

0660-89-R: Employees Association of Rochester Township (Applicant) v. The Corporation of the Township of Rochester (Respondent)

Unit: “all employees of the respondent in the Township of Rochester regularly employed for not more than 24 hours per week, save and except administrator-clerk and clerk treasurer and persons above the rank of administrator-clerk and clerk treasurer” (5 employees in unit)

0789-89-R: Ontario Public Service Employees Union (Applicant) v. Niagara District Homes Committee for the Physically Disabled (Respondent)

Unit: “all employees of the respondent at the Tanguay Place project in the City of Welland, save and except co-ordinators, person above the rank of co-ordinator, office and clerical staff” (20 employees in unit) (*Having regard to the agreement of the parties*)

0791-89-R: Ontario Public Service Employees Union (Applicant) v. Dufferin Area Hospital (Respondent)

Unit #1: “all office and clerical employees of the respondent in Orangeville, save and except Department Heads, persons above the rank of Department Head, Admitting Supervisor, Executive Director’s Secretary, Administrative Secretaries, Payroll/Human Resources Secretaries, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in a co-operative training program funded or sponsored by government, government agencies or educational institutions” (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all office and clerical employees of the respondent in Orangeville regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, admitting supervisor, executive director’s secretary, administrative secretaries, payroll/human resources secretaries and students employed in a co-operative training program funded or sponsored by government, government agencies or educational institutions” (20 employees in unit) (*Having regard to the agreement of the parties*)

0829-89-R: Graphic Communications International Union, Local 466 (Applicant) v. Atlantic Packaging Products Ltd. (Respondent)

Unit: “all employees of the respondent for the Plastic Bag Division located at 80 Progress Avenue in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff and sales staff, persons regularly employed for not more than 24 hours per week” (53 employees in unit) (*Having regard to the agreement of the parties*)

0837-89-R: Ontario Public Service Employees Union (Applicant) v. Sudbury Youth Services Inc. (Respondent)

Unit #1: “all employees of the respondent in the City of Sudbury, save and except Assistant Director, persons above the rank of Assistant Director, Secretary/Bookkeeper, Secretary to the Director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the City of Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Assistant Director, persons above the rank of Assistant Director, Secretary/Bookkeeper and Secretary to the Director” (9 employees in unit) (*Having regard to the agreement of the parties*)

0839-89-R: Service Employees’ International Union, Local 204, affiliated with the S.E.I.U., A.F. OF L., C.I.O., C.L.C. (Applicant) v. Trinity College (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the university vacation period, save and except supervisors, persons above the rank of supervisor, professional staff, office staff and library staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

0844-89-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Hearst Board of Education (Respondent)

Unit: “all office, clerical and technical employees of the respondent, save and except Business Administrator/Superintendents, persons above the rank of Business Administrator/Superintendent, Secretary to the Business Administrator and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

0846-89-R: Canadian Union of Public Employees (Applicant) v. Mercury Residences o/a Mercury Youth Services (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisor and persons above the rank of supervisor” (15 employees in unit) (*Having regard to the agreement of the parties*)

0854-89-R: The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Thomson Newspapers Company Ltd. (Respondent)

Unit: “all employees of the respondent at its Sudbury Star Division building, maintenance department, in the Regional Municipality of Sudbury, save and except maintenance supervisor, persons above the rank of maintenance supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

0895-89-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Applicant) v. Calorific Construction Ltd. (Respondent)

Unit: “all boilermakers and boilermakers apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman” (60 employees in unit)

0909-89-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Local No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. VS Services Ltd. (Respondent)

Unit: “all route persons of the respondent at its Niagara Frontier Caterers Division in St. Catharines, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

0934-89-R: United Brotherhood of Carpenters & Joiners of America, Local 2737 (Applicant) v. Rymer Composites Manufacturing Inc. (Respondent)

Unit #1: “all employees of the respondent in the City of Thorold, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the City of Thorold regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office, clerical and sales staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

0942-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bleachers Canada Inc. (Respondent)

Unit: “all employees of the respondent working at and out of the Regional Municipalities of Metropolitan Toronto, Peel, Halton, York Region and Durham, save and except foreman, persons above the rank of foreman and office and sales staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

0964-89-R: Ontario Public Service Employees Union (Applicant) v. Catholic Family Services of Toronto (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the program director, persons above the rank of program director, the controller, the business manager, the zone directors, the administrative assistant-secretary to the corporation, the business office supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (16 employees in unit) (*Having regard to the agreement of the parties*)

0965-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. DSC Equipment Rentals Ltd. (Respondent)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0968-89-R: United Steelworkers of America (Applicant) v. Winston Steel Inc. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and students employed during the school vacation period” (22 employees in unit) (*Having regard to the agreement of the parties*)

0974-89-R: Labourers’ International Union of North America, Local 607 (Applicant) v. Jonroy Equipment Rentals Ltd. (Respondent)

Unit: “all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0977-89-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Itarcan Construction Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

0981-89-R: Canadian Union of Public Employees (Applicant) v. The Woodstock Public Library Board (Respondent)

Unit: “all employees of the respondent regularly employed for not more than 24 hours per week, save and except chief librarian, persons above the rank of chief librarian, curator of the Art Gallery and confidential secretary-bookkeeper and employees in bargaining units for which any trade union held bargaining rights as of July 13, 1989” (20 employees in unit) (*Having regard to the agreement of the parties*)

1022-89-R: United Steelworkers of America (Applicant) v. Pemco Steel Sales Ltd. (Respondent)

Unit #1: “all employees of the respondent in the City of Pembroke, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all students employed during the school vacation period, by the respondent in the city of Pembroke, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

1043-89-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Robertdale Electrical Contractors Inc. (Respondent)

Unit: “all electricians and electricians apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and

electricians' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1054-89-R: Hotel Employees Restaurant Employees union, Local 75 (Applicant) v. Clover Catering (Respondent)

Unit #1: "all employees of the respondent employed at Barton Place Nursing Home, 914 Bathurst Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and accounting staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent at Barton Place Nursing Home, 914 Bathurst Street in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and accounting staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1057-89-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. H & L Mechanical Ltd./Ltée. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1059-89-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rhucon 1988 Inc. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

1064-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Pancor Industries Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1107-89-R: United Steelworkers of America (Applicant) v. McKeough Sons Company Ltd. (Respondent)

Unit: "all employees of the respondent in the City of London, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (9 employees in) (*Having regard to the agreement of the parties*)

1118-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. N-Art Display Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (55 employees in unit)

1125-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. F.W. Woolworth Co. Ltd. (Respondent)

Unit: “all employees of the respondent in its retail store at 500 Railway Street in the Municipality of Kenora, Ontario, regularly employed for less than 20 hours per week and students employed during the school vacation period, save and except assistant store managers, persons above the rank of assistant store manager, personnel manager, management trainee, office staff and service desk clerks” (45 employees in unit) (*Having regard to the agreement of the parties*)

1189-89-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Dante A. Caletti Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1615-89-R: International Woodworkers of America (Applicant) v. Demers & Dargy Transport Inc. (Respondent)

Unit: “all employees of the respondent employed as truck and transport drivers at Kenora, save and except foremen and persons above the rank of foreman” (2 employees in unit)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

1702-87-R: International Woodworkers of America (Applicant) v. Paramount Transportation Ltd. (Respondent)

Unit: “all employees of the respondent employed as truck and transport drivers at and out of the District of Thunder Bay, save and except foremen and persons above the rank of foreman” (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	7
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1

0664-89-R: Canadian Union of Public Employees (Applicant) v. Laurentian University of Sudbury (Respondent)

Unit: “all stationary engineers, helpers and shift mechanics of the respondent in the City of Sudbury, save and except forepersons, persons above the rank of forepersons, and office, clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	7
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Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0616-89-R: Service Employees' International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Shelburne District Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Shelburne, Ontario, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical staff, supervisors, persons above the rank of supervisor, office and clerical staff" (47 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	47
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	14

0620-89-R: United Steelworkers of America (Applicant) v. Delta Plating Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen and persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (78 employees in unit)

Number of names of persons on revised voters' list	87
Number of persons who cast ballots	74
Number of ballots marked in favour of applicant	48
Number of ballots marked against applicant	26

Applications for Certification Dismissed Without Vote

0361-89-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Her Majesty The Queen in Right of Canada as represented by Treasury Board (Respondent) (132 employees in unit)

0442-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Manco, General Contractors (Respondent) (3 employees in unit)

1120-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Centrac Industries Ltd. (Respondent) (202 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1612-87-R: International Woodworkers of America (Applicant) v. Taiga Trucking (Ontario) 1980 Inc. (Respondent)

Unit: "all employees of the Taiga Trucking (Ontario) 1980 Inc. employed as truck and transport drivers in the Province of Ontario, save and except foremen, persons above the rank of foreman" (10 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	4

0041-89-R: Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa Board of Education (Respondent) v. Ottawa Board of Education Employees Union, (Intervener #1) v. Service & Commercial Employees Union, Local 272 (Intervener #2)

Unit: “all employees of the respondent (including regular full time, regular part time and temporary employees) engaged in maintenance services and plant operations, save and except persons above the rank of Assistant to the Supervisor of Busing, Foremen, Office Staff, Stockkeepers, Clerks of Supply, Cafeteria Cook Managers, casual employees, students employed during the school vacation periods or persons employed under a work incentive program sponsored by other than the respondent” (694 employees in unit)

Number of names of persons on revised voters' list	747
Number of persons who cast ballots	680
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	181
Number of ballots marked in favour of intervener #1	450
Ballots segregated and not counted	36

0221-89-R: Teamsters Local No. 879 (Applicant) v. Jax Mould & Machine Ltd. (Respondent) v. Jax Employees Association (Intervener) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Town of Simcoe, save and except supervisors, those above the rank of supervisor, office and clerical staff, sales staff and technical staff” (75 employees in unit)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	71
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	40

0769-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Canadiana Textile Screen Prints Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Erin, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (28 employees in unit)

Number of names of persons on list as originally prepared by employer	28
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	17

0938-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. VDO Yazaki Ltd. (Respondent)

Unit: “all employees of the respondent at Barrie, Ontario, save and except supervisors, persons above the rank of supervisor, technologists, and office and sales staff” (126 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	112
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	110
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	70

Applications for Certification Dismissed Subsequent to Post-Hearing Vote

0656-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Seeburn Metal Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in Beaverton, Ontario, save and except supervisors, persons above the

rank of supervisor, office, sales, engineering staff and students employed during the school vacation period” (181 employees in unit)

Number of names of persons on revised voters' list	181
Number of persons who cast ballots	178
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	172
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of ballots marked in favour of applicant	61
Number of ballots marked against applicant	111
Ballots segregated and not counted	6

Applications for Certification Withdrawn

2380-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Arlington Crane Service Ltd. and Arlington Crane Service (1987) Ltd. (Respondents)

0208-89-R: International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Applicant) v. 727849 Ontario Ltd. c.o.b. as Viscount Glass & Aluminum (Respondent) v. Group of Employees (Objectors)

0559-89-R: Independent Union of Precision Diecasters (I.U.P.D.) (Applicant) v. Fisher Gauge Ltd. (Respondent) v. Group of Employees (Objectors)

0812-89-R: Ontario Public Service Employees Union (Applicant) v. Riverdale Hospital (Respondent)

0941-89-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bleachers Canada Inc. (Respondent)

1034-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Brown Shoe Company of Canada Ltd. (Stirling Plant) (Respondent)

1093-89-R: Canadian Union of Public Employees (Applicant) v. The Kapuskasing Roman Catholic Separate School Board (Respondent)

1161-89-R: The Oxford County Board of Education Office Employees Association (Applicant) v. Oxford County Board of Education (Respondent)

1194-89-R: Association of Canadian Film Craftspeople (Applicant) v. NPL Ltd. (Respondent) v. Canadian Association of Motion-picture and Electronic Recording Artists (C.A.M.E.R.A.), Local 18 C.L.C. (Intervener)

1198-89-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. New Generation Drywall Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0595-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada & Community Legal Education Ontario (Respondents) v. The Ontario Association of Legal Clinics ('OALC') and York Community (Interveners) (*Granted*)

0828-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada & Tenant Hotline Inc. (Respondents) v. York Community Services (Intervener) (*Granted*)

1399-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the

Administration of the Law Society of Upper Canada & Neighbourhood Legal Services (Respondents) v. The Ontario Association of Legal Clinics ('OALC') and York Community Services (Intervener) (*Granted*)

1898-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada & Injured Workers' Consultants (Respondents) (*Granted*)

0900-89-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. B. C. Meck, a Division of 99538 Canada Inc. and T.C.R. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0595-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada & Community Legal Education Ontario (Respondents) v. The Ontario Association of Legal Clinics ('OALC') and York Community (Interveners) (*Granted*)

0828-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada & Tenant Hotline Inc. (Respondents) v. York Community Services (Intervener) (*Granted*)

1399-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada & Neighbourhood Legal Services (Respondents) v. The Ontario Association of Legal Clinics ('OALC') and York Community Services (Intervener) (*Granted*)

1898-86-R: Ontario Public Service Employees Union (Applicant) v. The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada & Injured Workers' Consultants (Respondents) (*Granted*)

2380-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Arlington Crane Services Ltd. and Arlington Crane Service (1987) Ltd. (Respondents) (*Withdrawn*)

0901-89-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. B. C. Meck, a Division of 99538 Canada Inc. and T.C.R. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0869-89-R: Graphic Communications Union, Local 41-M (Applicant) v. Mutual Press Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0091-88-R: Teamsters Local No. 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sony Electronics Ltd. (Respondent) (14 employees in unit) (*Granted*)

3221-88-R: Mary Dyson on behalf of Local 1717 members (Applicant) v. Canadian Union of Public Employees (Respondent) v. Humewood House Association (Intervener)

Unit #1: "all employees of Humewood House Association in the Municipality of Metropolitan Toronto, save and except Executive Director, Secretary to the Executive Director, Residential Co-ordinator, Secretary of Community Programmes, Co-ordinator of Community Programmes, persons above the rank of persons regularly employed for not more than 24 hours per week" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Granted*)

Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	6

Unit #2: "all employees of Humewood House Association in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except Executive Director, Secretary to the Executive Director, Residential Co-ordinator, Secretary of Community Programmes and Co-ordinator of Community Programmes" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Dismissed*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	1

0654-89-R: Robert Sharp (Applicant) v. United Food & Commercial Workers International Union, Local 633 (Respondent) v. Morrison's Meat Packers Ltd. (Intervener) (23 employees in unit) (*Granted*)

0703-89-R: N. Bacchus (Applicant) v. Teamsters, Local 847 (Respondent) (*Withdrawn*)

0704-89-R: Robert A. Wallace (Applicant) v. United Food & Commercial Workers Union (Respondent) (0 employee in unit) (*Dismissed*)

0893-89-R: James Olds & Fulltime Employees of Stewarts IGA (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Stewarts IGA (Intervener) (*Withdrawn*)

0894-89-R: Todd William James Patterson and the part time employees of Stewarts I.G.A. (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Part Time Unit) (Respondent) v. Stewarts IGA (Intervener) (*Withdrawn*)

0902-89-R: Randall F. Brûlé (Applicant) v. Frantenite Inter-Provinciale des Ouvriers en Electricité (FIPOE) (Respondent) (9 employees in unit) (*Granted*)

0908-89-R: Scott James Kemp (Applicant) v. United Food & Commercial Workers International Union, Local 391W (Office) (Respondent) v. Coca-Cola Foods Canada Inc. (Intervener) (3 employees in unit) (*Granted*)

0920-89-R: Oxford County Board of Education Office Employees Association (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Oxford County Board of Education (Employer) (*Withdrawn*)

1086-89-R: G. Valente, J.D. Rutherford, K.N. Prajapati, S. De Jong (Applicants) v. Canadian Union of Operating Engineers & General Workers (Respondents) v. York Central Hospital (Intervener) (*Withdrawn*)

1162-89-R: Sandra Thornton and Others (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

1190-89-R: Merlin Godfrey (Applicant) v. Ontario Utility Foremen's Association (Respondent) (3 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0848-89-U; 0852-89-U; 0853-89-U: Slater Steels Hamilton Specialty Bar Division, A Division of Slater Industries Inc. (Applicant) v. United Steelworkers of America, Local 4752, A. Rodo et al (Respondents) (*Granted*)

1042-89-U: Weston Bakeries Ltd. (Eastern Avenue Plant) (Applicant) v. Kevin Calhoun, An Tan Chiem, Jose Cubias, Frank Frankovich, G. Heseltine, B. Larkin, Jim Nitsopoulos, Bob Kawahara, Henry Cormann and Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1032-89-U: Constructions Domi Inc. (Applicant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 and Robert Stoppel (Respondents) (*Granted*)

1106-89-U: Toronto Construction Association, General Contractors' Section, V.K. Mason Construction Ltd., Ellis-Don Forming Ltd., PCL Constructors Eastern Inc. and Eastern Construction Company Ltd. (Applicants) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721, Tony Almeda, Stan Arsenault & Jim Power (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0596-86-U: Ontario Public Service Employees Union (Complainant) v. Community Legal Education Ontario, The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada and Ross Irwin, (Respondents) v. York Community Services (Intervener) (*Dismissed*)

0829-86-U Ontario Public Service Employees Union, Complainant v. Tenant Hotline Inc., The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada and Ross Irwin, Respondents v. York Community Services (Intervener) (*Dismissed*)

1400-86-U: Ontario Public Service Employees Union (Complainant) v. Neighbourhood Legal Services, The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada and Ross Irwin (Respondents) v. York Community Services (Intervener) (*Dismissed*)

1899-86-U: Ontario Public Service Employees Union, (Complainant) v. Injured Workers' Consultants, The Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada and Ross Irwin (Respondents) (*Dismissed*)

1004-87-U: Mavis Metherell and Patricia Kirton (Complainants) v. United Steelworkers of America, Local Union #8460 (Respondent) v. Stelco Inc. (Intervener) (*Dismissed*)

3156-87-U; 3367-87-U: Canadian Textile & Chemical Union (Complainant) v. Brown Manufacturing Ltd. (Respondent) (*Dismissed*)

0298-88-U: Gladys Emily Kirkwood (Complainant) v. Canadian Union of Public Employees, Local 1328 (Respondent) v. Metropolitan Separate School Board (Intervener) (*Dismissed*)

1693-88-U: Canadian Union of Public Employees, Local 543 and Brian McAllister (Complainants) v. The Corporation of the City of Windsor (Respondent) (*Withdrawn*)

1906-88-U: Mr. Ivan Gudelj (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondent) v. Canron Inc. (Intervener) (*Dismissed*)

2005-88-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Complainant) v. Metroland Printing, Publishing & Distributing, A Division of Harlequin Enterprises Ltd. (Respondent) (*Withdrawn*)

3150-88-U: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Complainant) v. Oakes Mechanical Contracting Ltd. (Respondent) (*Withdrawn*)

3174-88-U: Eugene MacKenzie (Complainant) v. Labourers' International Union of North America, Local 527 (Respondent) v. Duron Ottawa Ltd. (Intervener) (*Dismissed*)

0071-89-U: Niagara Bronze Ltd. (Complainant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union and Jack Erskine, et al. (Respondents) (*Dismissed*)

0326-89-U: United Steelworkers of America (Complainant) v. Valco Furniture Ltd. (Respondent) (*Withdrawn*)

0357-89-U: International Brotherhood of Painters & Allied Trades, Local 200, Ottawa (Complainant) v. 727849 Ontario Ltd. c.o.b. as Viscount Glass & Aluminum (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

0486-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Brian Chevrolet Oldsmobile Ltd. (Respondent) (*Withdrawn*)

0550-89-U: Hotels, Clubs, Restaurants, Taverns, Employees Union, Local 261 (Complainant) v. Suisha Gardens (Respondent) (*Withdrawn*)

0618-89-U: Ontario Public Service Employees Union and its Local 667 (Complainant) v. North Bay & District Association for the Mentally Retarded (Respondent) (*Withdrawn*)

0673-89-U; 0674-89-U; 0675-89-U: Canadian Union of Public Employees (Complainant) v. Helen Henderson Care Centre (Respondent) (*Withdrawn*)

0679-89-U: Baldassaro Giglia (Applicant) v. J. Harris Steel Rebar (Respondent) (*Withdrawn*)

0753-89-U: United Steelworkers of America (Complainant) v. Wilberforce Planing Mill Ltd. and Wilberforce Wood Components Ltd. (Respondent) (*Withdrawn*)

0761-89-U: The Newspaper Guild (Complainant) v. The Nugget, a division of Southam Inc. (Respondent) (*Withdrawn*)

0796-89-U: Lastan S. Forbes (Complainant) v. Caterpillar of Canada Ltd. & CAW-Canada, Local 252 (Caterpillar) (Respondent) (*Withdrawn*)

0801-89-U: Kent Stevens (Complainant) v. The International Brotherhood of Electrical Workers, Local 402 (Respondent) (*Withdrawn*)

0809-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Lisgar Construction Company and Labourers' International Union of North America, Local 183 (Respondents) (*Withdrawn*)

0828-89-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 469 (Respondent) (*Withdrawn*)

0850-89-U: The Corporation of the Township of Charlottenburgh (Complainant) v. Canadian Union of Public Employees, Local 3089 Karen Haack and Manon Migneault, on behalf of the clerical workers, Emile Tyo and Gerald McPhail on behalf of the roads and recreation workers and Andre Lamoureux, National Representative CUPE, representing both units (Respondents) (*Withdrawn*)

0855-89-U: Mrs. June Evans, Heather Preistap, Heather Hudson (Complainants) v. Reliance Electric & Employees Ass. (Respondent) (*Withdrawn*)

0858-89-U: Ontario Nurses' Association (Complainant) v. Corporation of the County of Elgin (Respondent) (*Withdrawn*)

0868-89-U: Ontario Public Service Employees Union (Complainant) v. Sault College (Respondent) (*Withdrawn*)

0872-89-U: Robert La Chapelle (Complainant) v. Toronto Transit Commission (Wheel Trans Div.) (Respondent) (*Dismissed*)

0884-89-U: Mike Crowder (Complainant) v. The Great Atlantic & Pacific Company of Canada Ltd. (Respondent) v. United Food & Commercial Workers International Union, Local 175/633 (Intervener) (*Withdrawn*)

0887-89-U: Sue Barnes (Complainant) v. Park Place Retirement Ctr., and Christian Labour Association Union (Respondents) (*Withdrawn*)

0890-89-U: Kimberley Ann Chrapek (Complainant) v. United Steelworkers of America Upholstery Division, Local 50, and Sklar Pepler (Respondents) (*Withdrawn*)

0904-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Cold Spring Food Products Ltd. (Respondent) (*Withdrawn*)

0922-89-U: Employees Association of Rochester Township (Complainant) v. The Corporation of the Township of Rochester (Respondent) (*Withdrawn*)

0927-89-U: Ontario Public Service Employees Union (Complainant) v. Sunnyside Children's Centre (Respondent) (*Withdrawn*)

0931-89-U: John McVey - Maintenance Dept., St. Catharines Transit (Complainant) v. Mr. Rick McKenzie, President & Business Agent, A.T.U., Local #846 (Respondent) (*Withdrawn*)

0936-89-U: United Steelworkers of America (Complainant) v. Forsco Inc. (Respondent) (*Withdrawn*)

0950-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Royal Homes Ltd. (Respondent) (*Withdrawn*)

0999-89-U; 1000-89-U; 1001-89-U: Bob Micaly (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Withdrawn*)

1002-89-U: Peter Fuller (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Withdrawn*)

1003-89-U: Wally Glover (Complainant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Withdrawn*)

1024-89-U: United Food & Commercial Workers International Union, Local 633 (Complainant) v. Cold Spring Food Products Ltd. (Respondent) (*Withdrawn*)

1030-89-U: Council of Printing Industries of Canada on behalf of Batten Converter Services a division of Jan-nock Imaging Companies Ltd. (Complainant) v. Graphic Communications International Union, Local 500M, E.M. McDonnel, W. Hutchings, and D. Panachuck (Respondents) (*Withdrawn*)

1044-89-U: The Newspaper Guild (Complainant) v. The Sudbury Star, A Division of Thompson Newspapers Company Ltd. (Respondent) (*Withdrawn*)

1065-89-U: Lucy A. Labelle (Complainant) v. Sudbury Hospital Services (Respondent) (*Withdrawn*)

1073-89-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Pharma Plus Drugmarts Ltd. (formerly Known as Boots Drug Store (Canada) Ltd.) (Respondent) (*Withdrawn*)

1104-89-U: Canadian Paperworkers Union (Complainant) v. Code Felt Ltd. (Respondent) (*Withdrawn*)

1115-89-U: Maria Bernardo (Complainant) v. Goldcrest Furniture & Union of Injured Workers (Respondents) (*Dismissed*)

1149-89-U: Marcella Mastroianni (Complainant) v. Sklar Peppler and United Steelworkers of America Upholstery Division, Local 50 (Respondents) (*Withdrawn*)

1163-89-U: Mark Lunn (Complainant) v. Steve Lillie (Respondent) (*Dismissed*)

1169-89-U: Employees Association of Rochester Township (Complainant) v. The Corporation of the Township of Rochester (Respondent) (*Withdrawn*)

1184-89-U: Mary Rose Celestini (Complainant) v. 'C' Collective Agreement C.U.P.E., Local 1317 (Respondent) (*Withdrawn*)

1268-89-U: General Motors of Canada Ltd. (Complainant) v. International Union, United Plant Guard Workers of America (UPGWA) and its Local 1962, Chris Topple (Respondent) (*Withdrawn*)

1274-89-U: Canadian Union of Public Employees, Local 161 (Complainant) v. Laurentian Hospital (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0237-89-M: Dana M. Colarusso (Applicant) v. Canadian Union of Education Workers, Local 2 (Respondent Trade Union) v. Department of English University of Toronto (Respondent Employer) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0568-89-M: Cowall Manufacturing Inc. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0685-89-M: Work Wear Corporation of Canada Ltd. (Employer) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

1186-89-M: Chatham Plastic Division (formerly Chatham Plastic Finishing Division, I.T.L. Industries Ltd. & Chatham Moulding Division, I.T.L. Industries Ltd.) (Employer) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 127 (Trade Union) (*Granted*)

FINANCIAL STATEMENT

0364-89-M: Thomas Neil McKinnon (Complainant) v. Manion & Wilkins & Assoc. Ltd. (Respondent) (*Withdrawn*)

1034-89-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Brown Shoe Company of Canada Ltd. (Stirling Plant) (Respondent) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1293-88-M: Ontario Secondary School Teachers' Federation (Applicant) v. The Dryden Board of Education (Respondent) (*Withdrawn*)

2590-88-M: Service Employees Union, Local 183 (Applicant) v. Wymering Manor (Respondent) (*Withdrawn*)

0546-89-M: London & District Service Workers' Union, Local 220 (Applicant) v. The Villa Home of Retirement (Respondent) (*Withdrawn*)

0669-89-M: Ontario Nurses' Association (Applicant) v. St. Michael's Hospital, Toronto (Respondent) (*Granted*)

0749-89-M: Canadian Union of Public Employees, Local 840 (Applicant) v. The Corporation of the City of York (Respondent) (*Withdrawn*)

1297-89-M: Tracy Castellan (Applicant) v. Chatelaine Villa Nursing Home (Respondent) (Dismissed)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2977-88-OH Canadian Union of Public Employees, Local 767 (Complainant) v. Metropolitan Toronto Housing Authority & Ontario Housing Corporation (Respondents) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

0689-89-M: Ontario Public Service Employees Union (Complainant) v. Cambrian College of Applied Arts & Technology (Respondent) (*Withdrawn*)

0995-89-M: Ontario Public Service Employees Union (Applicant) v. Lambton College of Applied Arts & Technology (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

0473-89-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Shapings Construction Inc. (Respondent) (*Granted*)

0531-89-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Stone & Webster (Respondent) (*Withdrawn*)

0750-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Camdenvale Development Inc. c.o.b. Braidwood Homes (Respondent) (*Withdrawn*)

0777-89-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Elite Construction (Respondent) (*Withdrawn*)

0798-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Canmec Mechanical (Respondent) (*Granted*)

0843-89-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Goldbelt Construction Ltd. (Respondent) (*Granted*)

0906-89-G: Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters & Joiners of America, on behalf of Local 27 (Applicant) v. F.T. Construction Inc. (Respondent) (*Granted*)

0945-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Valley Ridge Inc. (Respondent) (*Withdrawn*)

0966-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Belmont Construction Company Ltd. (Respondent) (*Withdrawn*)

1011-89-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Queenslea Drywall & Acoustic Ltd. (Respondent) (*Withdrawn*)

1015-89-G: Labourers' International Union of North America, Local 183 (Applicant) v. Vaughan Paving Ltd. (Respondent) (*Withdrawn*)

1019-89-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Traugott Construction Ltd. (Respondent) (*Withdrawn*)

- 1025-89-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Ltd. (Respondent) (*Withdrawn*)
- 1037-89-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. Canron Inc. (Respondent) (*Withdrawn*)
- 1038-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Ex-Act Investments Ltd. (Respondent) (*Withdrawn*)
- 1039-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Trojan Forming Company Ltd. (Respondent) (*Withdrawn*)
- 1046-89-G; 1047-89-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Huffman Bros. Welding Ltd. (Respondent) (*Withdrawn*)
- 1066-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. McCartney Installations (Respondents) (*Withdrawn*)
- 1067-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. T.J.G. Installations (Respondent) (*Granted*)
- 1068-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Key Interior Installation Inc. (Respondent) (*Granted*)
- 1070-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Rocam Store Fixtures Ltd. (Respondent) (*Withdrawn*)
- 1081-89-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Two Star Carpentry (Respondent) (*Withdrawn*)
- 1087-89-G:** International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. Power Contracting Inc. (Respondent) (*Withdrawn*)
- 1097-89-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Sheafer-Townsend Mechanical-Electrical Ltd. (Respondent) (*Withdrawn*)
- 1099-89-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Jaddco Anderson Ltd. (Respondent) (*Withdrawn*)
- 1100-89-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Pumpcrete Rental Corporation (Respondent) (*Granted*)
- 1111-89-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Comstock International Ltd. (Respondent) (*Withdrawn*)
- 1132-89-G:** Sheet Metal Workers' International Association, Local 397 (Applicant) v. Canmec Mechanical Contractors Ltd. (Respondent) (*Granted*)
- 1134-89-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. York Roofing Ltd. (Respondent) (*Withdrawn*)
- 1144-89-G; 1146-89-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 796249 Ontario Ltd. (Respondent) (*Withdrawn*)
- 1150-89-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Sutherland - Shultz Ltd. (Respondent) (*Withdrawn*)

1200-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Nicholls-Radtke & Associates Ltd. (Respondent) (*Withdrawn*)

1209-89-G: Labourers' International Union of North America, Local 837 (Applicant) v. Solar Erectors Ltd. (Respondent) (*Withdrawn*)

1238-89-G: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. G. Macera Contracting Ltd. (Respondent) (*Withdrawn*)

1241-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Romko Excavating Inc. (Respondent) (*Granted*)

1261-89-G: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Applicant) v. Bar-Bro Construction (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0445-87-U: Jean Liebman (Complainant) v. York Univeristy Staff Association & York University (Respondents) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

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